SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 833

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, APPELLANT,

vs.

JESS G. READ, INSURANCE COMMISSIONER OF THE STATE OF OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 23, 1945

[fols. 1-10]

IN DISTRICT COURT OF OKLAHOMA COUNTY

No. 105,488

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, a Corporation, Plaintiff,

vs.

JESS G. READ, The Insurance Commissioner of the State of Oklahoma; and CARL B. SEBRING, State Treasurer of the State of Oklahoma, Defendants

PETITION—Filed March 27, 1942

Comes now The Lincoln National Life Insurance Company, a corporation, plaintiff, and respectfully avers that it is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, with its principal place of business at Fort Wayne in said state, and is now and has been for many years engaged in the life insurance business; that plaintiff is and has been during all of the times herein mentioned duly licensed and authorized to transact its business of insurance in the State of Oklahoma, and has paid all taxes and fees lawfully assessed or imposed by the State of Oklahoma for the rights and privileges aforesaid.

That the defendant Jess G. Read is the duly elected, qualified and acting Insurance Commissioner of the State of Oklahoma.

[fol. 11] That the defendant Carl B. Sebring is the duly elected, qualified and acting State Treasurer of the State of Oklahoma.

First Cause of Action

I

Plaintiff, for its first cause of action, avers that Section 1, Chapter 1a, Title 36, Session Laws of Oklahoma, 1941, otherwise known as House Bill No. 353 (Sec. 104, Title 36,

Oklahoma Statutes 1941), approved effective on April 25th, 1941, provides as follows:

"Reports—Gross Premiums.

"Section 1. That Section 10478, Oklahoma Statutes of 1931 be and is hereby amended to read as follows:

"'Every foreign insurance company, copartnership, association, inter-insurance exchange or individual who is a nonresident of the State of Oklahoma, doing business in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in [fol. 12] this State within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, which tax, in addition to an annual tax of three dollars ($3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma Statutes, 1931, shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars ($500.00); and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State.'"

II

[fol. 13] That Section 10478, Oklahoma Statutes of 1931, provides as follows:

"Foreign Companies—Annual Report of Premiums—Fees and Taxes.

"Every foreign insurance company doing business in this State under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the insurance commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same time pay to the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision [fol. 14] or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State."

III

That plaintiff on the 28th day of February, 1942, delivered to the defendant Jess G. Read, the Insurance Commissioner of the State of Oklahoma, its written report under oath according to the provisions of House Bill No. 353 above quoted; that said report is on file in the office of said defendant and is by reference to such record made a part hereof.

IV

That as shown by the report referred to in the preceding paragraph, the gross premiums received by plaintiff in the State of Oklahoma within the twelve months next preceding the first day of January, 1942, amounts to the total [fol. 15] sum of $156,897.19, and the dividends paid by plaintiff to policy holders amount to the sum of $923.80, and cancellations to policy holders amount to the sum of $73,408.21.

V

That by virtue of the statutes above quoted, a tax is imposed on all premiums collected in the State of Oklahoma, after all cancellations and dividends to policy holders are deducted; that on all such premiums (less the deductions so authorized) collected prior to the 25th day of April, 1941, when said House Bill No. 353 became effective, a tax of 2% is imposed; that on all such premiums (less the deductions so authorized) collected on or after the 25th day of April, 1941, a tax of 4% is imposed.

VI

That the amount of the tax of 2% on all premiums received by plaintiff and collected in the State of Oklahoma less the deduction authorized by law for the period beginning January 1st, 1941, and ending April 24th, 1941, is the sum of $847.18; that the defendant Insurance Commssioner demanded that plaintiff pay a tax in the sum of $3302.61, said sum being 4% on the amount of the premiums, less the amount of the dividends and cancellations as set forth in paragraph IV hereof; that plaintiff at the time of filing its report as set forth in paragraph III hereof paid to [fol. 16] the defendant Insurance Commissioner, pursuant to his demand as aforesaid, the said sum of $3302.61, being the amount of tax alleged by said defendant to be assessed and levied against plaintiff under and by virtue of said House Bill No. 353, and for which payment plaintiff has received a receipt issued by said defendant under date of March 2d, 1942; that said payment includes the sum of $1651.31 which was paid under protest by plaintiff pursuant to a notice served according to law upon the defendants and each of them at the time of such payment. A true and correct copy of said notice, marked "Exhibit A", is

hereto attached and made a part hereof. That the defendants and each of them have failed and refused to repay to plantiff the sum so paid under protest.

VII

That the tax so paid under protest is illegal and the law provides no appeal from unlawful demands and actions of the defendant Insurance Commissioner, as particularly set forth in said notice of protest (Exhibit A hereto attached); that it is the duty of the defendants and each of them, as provided by law, to hold such taxes separate and apart from all other taxes collected until the final determination of this suit.

Second Cause of Action

I

Plaintiff, for its second cause of action against the de-
[fol. 17] fendants, and each of them, makes a part hereof as if fully set forth at length all of the allegations of its first cause of action.

II

Plaintiff further avers that plaintiff received a letter under date of March 3d, 1942, from the defendant, Insurance Commissioner, acknowledging receipt of plaintiff's annual statement together with attached forms, and wherein said defendant advised plaintiff as follows, to-wit:

"I do not believe that you are entitled to deduct as cancellations $73,408.21 representing cash values paid on surrender of life insurance policies. Unless you can present convincing evidence that this deduction should be allowed your license will not be issued until the 4% gross premium tax is paid on said amount."

III

That thereafter the defendant Insurance Commissioner demanded that plaintiff pay a tax in the sum of $2936.33, said sum being 4% on the sum of $73,408.21; that said sum of $73,408.21 constitutes the amount of cancellations to policy holders as reported to the defendant Insurance Commissioner at the time and in the manner set forth in plaintiff's first cause of action; that the amount of such

[fol. 18] cancellations consists of surrenders and terminations of life insurance contracts and payments thereon made to policy holders according to the terms and provisions of such contracts, and is a proper and lawful deduction from the amount of the premiums received by plaintiff in the State of Oklahoma within the twelve months next preceding the first day of January, 1942, in determining the amount of the tax to which plaintiff is subject and obligated to pay according to the provisions of the statutes above quoted; but the defendant Insurance Commissioner unlawfully disallowed as a deduction the amount of such cancellations as aforesaid.

IV

That on the 19th day of March, 1942, plaintiff paid to the defendant Insurance Commissioner pursuant to his demand as aforesaid the said sum of $2936.33, being the amount of tax alleged by said defendant to be assessed and levied against plaintiff under and by virtue of said House Bill No. 353, and for which payment plaintiff has received a receipt issued by said defendant under date of March 19th, 1942; that said payment was made under protest by plaintiff pursuant to a notice served according to law upon the defendants and each of them at the time of such payment, a true and correct copy of such notice, marked "Exhibit B" is hereto attached and made a part hereof. That the defendants and each of them have failed and refused to repay to plaintiff the sum so paid under protest.

[fol. 19]

V

Plaintiff contends that the words of the statutes above quoted, which exempt from the tax thereby imposed "all cancellations * * * to policy holders" must necessarily include surrender values and all considerations paid to policy holders upon the surrender, termination, and cancellation of the contract of insurance.

VI

That the tax so paid under protest is illegal and the law provides no appeal from the unlawful demands and actions of the defendant Insurance Commissioner, as particularly set forth in said notice of protest (Exhibit B hereto attached); that it is the duty of the defendants and each of

them, as provided by law, to hold such taxes separate and apart from all other taxes collected until the final determination of this suit.

Wherefore, plaintiff prays that it have and recover judgment herein determining and establishing: That the taxes in the sum of $847.18 upon which plaintiff's first cause of action is predicated, and the taxes in the sum of $2936.33 upon which plaintiff's second cause of action is predicated, were illegally collected, as not being due the State of Oklahoma; that such taxes so paid to the defendant Insurance Commissioner are in excess of the legal and correct amount [fol. 20] provided by law, and that ther-upon the defendants, or either of them holding such taxes at the time, be ordered and directed to pay to plaintiff the sum of $847.18 upon its first cause of action, and the sum of $2936.33 upon its second cause of action.

Plaintiff further prays that the defendants and each of them be ordered and directed to keep and hold such taxes separate and apart from all other taxes collected until the final determination of this suit; and that plaintiff have such other and further relief as may be just and proper in the premises.

(Signed) Miley, Hoffman, Williams, France & Johnson, Attorneys for the Plaintiff.

Duly sworn to by Russell V. Johnson. Jurat omitted in printing.

[fol. 21] [File endorsement omitted.]

[fol. 22] EXHIBIT "A" TO PETITION

Protest of the Lincoln National Life Insurance Company

To Jess G. Read, Insurance Commissioner of the State of Oklahoma; State Capitol, Oklahoma City, Oklahoma; To Carl B. Sebring, State Treasurer of the State of Oklahoma, State Capitol, Oklahoma City, Oklahoma.

GENTLEMEN:

You and each of you are hereby notified that The Lincoln National Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of

Indiana, and having its principal place of business at Fort Wayne, the State of Indiana, does hereby pay to the Insurance Commissioner of the State of Oklahoma the sum of Thirty-three Hundred Two and 61/100 Dollars ($3302.61), demanded by said Insurance Commissioner, said sum being the amount of tax alleged to be assessed and levied against the undersigned under and by virtue of Section 10478, Oklahoma, Statutes 1931, and Chapter I a, Title 36, Session Laws of Oklahoma, 1941, otherwise known as House Bill 353, enacted by the Eighteenth Legislature, approved April 25, 1941, on all premiums collected in the State of Oklahoma by the Undersigned within the twelve months next preceding the first day of January, 1942; said sum so paid being four per cent (4%) of such premiums, less deductions allowed by law.

[fol. 23] That the amount of such tax upon said premiums collected by the undersigned in said state during the period beginning January 1, 1941, and ending April 25, 1941, the date of the approval of said act, is the sum of Sixteen Hundred Ninety-four and 36/100 Dollars ($1694.36); that the amount of such tax upon such premiums collected by the undersigned in said state during the period beginning April 25, 1941, and ending December 31, 1941, was and is the sum of Sixteen Hundred Eight and 25/100 Dollars ($1608.25).

That said payment includes the following amount which your protestant alleges is unconstitutional, illegal, excessive and void, to-wit:

> Sixteen Hundred Fifty-one and 31/100 Dollars ($1651.31) being tax in excess of two per cent on all premiums collected in Oklahoma on insurance policies during the calendar year 1941.

That said tax paid *paid* under protest, so alleged to be unconstitutional, illegal, excessive and void, is paid involuntarily, under duress and compulsion and under protest and only in response to the demand of said Insurance Commissioner; that said tax so paid under protest is unconstitutional, illegal, excessive and void for the reason and upon the grounds that said Act of April 25, 1941 does impose [fol. 24], said taxes upon this protestant and said Act should not be construed as imposing such taxes on this protestant; that said Act is a revenue measure, and the taxes sought to be imposed thereby are sought to be im-

posed exclusively upon protestant and other foreign insurance companies doing business in the State of Oklahoma, and not upon domestic insurance companies doing business within the State of Oklahoma; that such Act attempts to levy an arbitrary and discriminatory tax upon protestant after it was duly admitted to the State of Oklahoma and while it was and is a quasi citizen thereof and a person within its jurisdiction entitled to the equal protection of the laws; that by reason of the foregoing and other substantial grounds, said legislative acts purporting to assess said taxes and the acts of said Insurance Commissioner in demanding, receiving and collecting said taxes are each in contravention of the Constitution and laws of the United States of America, in that the same constitute and are a taking of the property of the undersigned without due process of law, as prohibited by the Fifth and Fourteenth Amendments of the Constitution of the United States of America and as prohibited by the Constitution of the State of Oklahoma, and constitute and are a denial to the undersigned of the equal protection of the laws, as prohibited by the Fourteenth Amendment to the Constitution of the United States of America and the provisions of the Constitution of the State of Oklahoma; that in paying said [fol. 25] tax under protest, the undersigned relies upon and expressly invokes the protection of all the applicable provisions of the Constitution and laws of the State of Oklahoma and the Constitution and laws of the United States of America, including (but not excluding others) the Fifth and Fourteenth Amendments to the Constitution of the United States of America, prohibiting the taking of property without due process of law and prohibiting the denial to any person of the equal protection of the laws.

You and each of you are hereby further notified that said tax so paid under protest, in the sum of Sixteen Hundred Fifty-one and 31/100 Dollars ($1651.31), is unconstitutional, illegal, excessive and void and that said Insurance Commissioner is without power, authority or jurisdiction to assess, levy or collect the same, and that said tax is paid involuntarily and under protest for the purpose of avoiding burdensome penalties threatened to be imposed and to prevent the cancellation of the license of protestant to transact business within the state. Demand is hereby made that said sum so paid under protest, to-wit: the sum of

Sixteen Hundred Fifty-one and 31/100 Dollars ($1651.31), be repaid and refunded to the undersigned protestant.

You and each of you are further notified that said taxes purportedly imposed upon premiums collected by foreign insurance companies in Oklahoma under and by virtue of [fol. 26] Section 1, Chapter 1-a, House Bill 353, Session Laws Oklahoma 1941, page 121, and said act, are each and all unconstitutional and void for the further reason that such premium taxes are diverged by said act to uses and purposes not authorized by the Constitution and laws of Oklahoma and in a manner not authorized by the Constitution and laws of Oklahoma, and all of which is expressly prohibited by Article XIV of the Constitution of the State of Oklahoma.

You and each of you are further notified that unless said sum so paid under protest is repaid that protestant will, at the time and in the manner provided by law, institute suit for the recovery of the same, or take other appropriate action to protect its legal rights and that you and each of you shall segregate said fund and hold the same in a separate account and not pay the same into the State Treasury of this State for a period of thirty days from this date, and that if suit be filed within such period, that such fund so segregated shall be further held pending the outcome of said suit, all as provided by law.

This protest is executed in duplicate this 26th day of February, 1942.

The Lincoln National Life Insurance Company, by R. F. Baird, Its Vice President.

[fol. 27] Receipt

Receipt of duplicate original of the protest, of which the within and foregoing is a full, true and correct copy, is hereby acknowledged at the time of the payment of the tax therein mentioned.

Jess G. Read, by Andy Crosby, Jr., Asst. Insurance Commissioner of the State of Oklahoma.

C. B. Sebring, State Treasurer of the State of Oklahoma.

[fol. 28] EXHIBIT "B" TO PETITION

Protest of the Lincoln National Life Insurance Company

To Jess G. Read, Insurance Commissioner of the State of Oklahoma, State Capitol, Oklahoma City, Oklahoma.

To Carl B. Sebring, State Treasurer of the State of Oklahoma, State Capitol, Oklahoma City, Oklahoma.

GENTLEMEN:

You and each of you are hereby notified that the Lincoln National Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Indiana and having its principal place of business at Fort Wayne in said State, does herewith pay to the said Insurance Commissioner of the State of Oklahoma the sum of Twenty Nine Hundred Thirty Six and 33/100 Dollars ($2,936.33), demanded by said Insurance Commissioner, said sum being the amount of tax alleged to be assessed and levied against the undersigned under and by virtue of Sec. 10478, Oklahoma Statutes 1931 as amended and Chapter 1A, Title 36, Session Laws of Oklahoma 1941, otherwise known as House Bill 353, enacted by the Eighteenth Legislature, approved April 25, 1941, on the sum of Seventy-three Thousand Four Hundred Eight and 21/100 Dollars ($73,408.21) which said Insurance Commissioner of the State of Oklahoma has disallowed as a deduction, [fol. 29] because of cancellations, from the premiums collected in the State of Oklahoma by the undersigned within the twelve months next preceding the first day of January, 1942, said sum so paid being four per cent (4%) of said cancellations;

That under said Section it is provided that there shall be imposed an annual tax of four per cent (4%) on all premiums collected in the State of Oklahoma, after all cancellations and dividends to policyholders are deducted and that the amount of cancellations claimed by said Insurance Company in submission of its annual report is the sum of Seventy-three Thousand Four Hundred Eight and 21/100 Dollars ($73,408.21) for the twelve months next preceding the first day of January, 1941; that said sum has been disallowed by the said Insurance Commissioner as a deduction from the Premiums collected by said Insurance Company in the State of Oklahoma for the year reflected

by said annual report and by reason thereof the tax imposed by said Section is increased in the sum of Twenty Nine Hundred Thirty Six and 33/100 Dollars ($2936.33);

That said payment in the sum of Twenty Nine Hundred Thirty Six and 33/100 Dollars ($2936.33) constitutes a tax paid under protest and is illegal, excessive and void for the reason and upon the grounds that the cancellations for which the deduction was sought consist of surrenders and termina-
[fol. 30] tions of life insurance contracts, said surrenders constituting cancellations within the intent and meaning of the act and/or a return of premiums for which deductions are claimed as allowable.

You and each of you are hereby further notified that said tax so paid under protest in the sum of Twenty Nine Hundred Thirty Six and 33/100 Dollars ($2936.33) is illegal, excessive and void and that said Insurance Commissioner is without power, authority or jurisdiction to assess, levy or collect the same and that said tax is paid involuntarily and under protest for the purpose of avoiding burdensome penalties threatened to be imposed and in prevention of the cancellation of the license of protestant to transact business within the state. Demand is hereby made that said sum so paid under protest, to-wit, the sum of Twenty Nine Hundred Thirty Six and 33/100 Dollars ($2936.33) be repaid and refunded to the undersigned protestant.

You and each of you are hereby further notified that unless said sum so paid under protest is repaid that protestant will at the time and in the manner provided by law institute a suit for the recovery of the same, or take other appropriate action to protect its legal rights, and that you and each of you shall segregate said funds and hold the same in a separate account and not pay the same into the State Treasury of this State for a period of thirty days from this
[fol. 31] date, and that if a suit be filed within such period, that such funds so segregated shall be further held pending the outcome of said suit, all as provided by law.

This protest is executed in triplicate this 17th day of March, 1942.

The Lincoln National Life Insurance Company, by
R. F. Baird, Its Vice President.

Receipt of triplicate original of the protest of which the within and foregoing is a full, true and correct copy is

hereby acknowledged at the time of the payment of the tax therein mentioned.

Jess G. Read, by Andy Crosby, Jr., Asst. Insurance Commissioner of the State of Oklahoma. C. B. Sebring, State Treasurer of the State of Oklahoma.

[fols. 32-34] [File endorsement omitted.]

[fol. 35] In the District Court of Oklahoma County

Summons and Return—Filed April 3, 1942

The State of Oklahoma to the Sheriff of Oklahoma County in said State—Greeting:

You are hereby commanded to notify the defendants Jess G. Read, The Insurance Commissioner of the State of Oklahoma; and Carl B. Sebring, State Treasurer of the State of Oklahoma, that they have been sued by The Lincoln National Life Insurance Company, a corporation, In the District Court sitting in and for said County of Oklahoma, and that unless they answer by the 27th day of April, 1942, the petition of said plaintiff against said defendants filed in the District Court such petition will be taken as true and judgment rendered accordingly.

You will make due return on this summons on the 6th day of April, A. D. 1942.

Witness my hand and seal of said court, affixed at my office in Oklahoma City, Oklahoma, this 27th day of March,
[fol. 36] 1942.

Cliff Myers, Court Clerk. (Signed) by Leonard Simpson, Deputy. (Seal.)

Suit Brought For recovery of taxes paid under protest in the total amount of $3783.51.

If defendant —— fail —— answer, judgment will be taken as prayed in said petition.

Cliff Myers, Court Clerk. (Signed) by Leonard Simpson, Deputy. (Seal.)

(Return):

STATE OF OKLAHOMA,
Oklahoma County, ss.:

I received this writ March 27th, 1942, and executed the same in my County at the time and in the manner, as follows, to-wit:

Andy Crosby, Assistant Insurance Commissioner of the State of Oklahoma, March 28th, 1942, by delivering to the said Andy Crosby personally, in said County, a true and certified copy of the within summons with all endorsements [fols. 37-41] thereon, the said Jess G. Read, Insurance Commissioner of the State of Oklahoma being out of the City this 28th day of March, 1942.

Carl B. Sebring, State Treasurer of the State of Oklahoma, March 28th, 1942, by delivering to said defendant, personally, in said County, a true and correct copy of the within summons with all endorsements thereon.

Jess G. Read, Insurance Commissioner, of the State of Oklahoma, March 28th, 1942, by leaving for said defendant at the usual place of residence of each, in said County, a true and correct copy of the within summons with all endorsements thereon, to Mrs. Jess G. Read, his wife, a member of his family above the age of fifteen years.

George Goff, Sheriff. (Signed) by Chas. N. Sanders, Deputy Sheriff.

[fol. 42] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

AMENDED PETITION—Filed May 19, 1942

Comes now the Lincoln National Life Insurance Company, a corporation, plaintiff, and leave of court being first obtained, files this, its amended petition, herein, and respectfully avers:

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, with its principal place of business at Fort Wayne in said state, and is now and has been for many years engaged in the life insurance business. The defendant Jess G. Read is the duly elected, qualified, and acting Insurance Commissioner of the State of Oklahoma. The defendant Carl

B. Sebring is the duly elected, qualified, and acting State Treasurer of the State of Oklahoma.

[fol. 43] First Cause of Action

I.

Section 1, Chapter 1a, Title 36, Session Laws of Oklahoma, 1941, otherwise known as House Bill No. 353 (Sec. 104, Title 36, Oklahoma Statutes 1941, effective on April 25th, 1941, provides as follows:

"Section 1. That Section 10478, Oklahoma Statutes of 1931 be and is hereby amended to read as follows:

"'Every foreign insurance company, a copartnership, association, inter-insurance exchange or individual who is a nonresident of the State of Oklahoma, doing business in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted which tax, in addi-
[fol. 44] tion to an annual tax of three dollars ($3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma Statutes, 1931, shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars ($500.00); and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this

State until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State.'"

2

Section 10478, Oklahoma Statutes of 1931, provides as follows:

"Every foreign insurance company doing business in this State under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the insurance commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same [fol. 45] time pay to the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State."

3

Plaintiff on the 28th day of February, 1942, delivered to the defendant Jess G. Read, The Insurance Commissioner of the State of Oklahoma, its written report under oath

according to the requirements of the Statutes of Oklahoma; and said report is on file in the office of said defendant and [fol. 46] is by reference to such record made a part hereof. Said report discloses the following transactions of plaintiff in the State of Oklahoma during the calendar year 1941, to-wit: $156,897.19

Total amount of gross premiums received

Less:		
Dividends to policy holders	$ 923.80	
Cancellations to policy holders	73,408.21	74,332.01
All premiums collected after deducting all cancellations and dividends to policy holders		$82,565.18

4

Said House Bill No. 353 provides that any company failing to pay the premium tax as provided therein shall be subject to certain forfeitures and penalties, debarred from transacting any business of insurance in the State of Oklahoma until said taxes and penalties are fully paid, and revocation of the certificate of authority granted to the agents of that company to transact business in the State of Oklahoma.

5

At the time of filing its said report, plaintiff paid to the defendant Insurance Commissioner the sum of $3302.61, representing a premium tax of 4% upon the item of $82,565.18 disclosed by the report of plaintiff as above set forth.

6

Plaintiff received a letter under date of March 3d, 1942, from the defendant Insurance Commissioner, acknowledging receipt of plaintiff's annual statement together with attached forms, and wherein said defendant advised plaintiff as follows, to-wit:

[fol. 47] "I do not believe that you are entitled to deduct as cancellations $73,408.21 representing cash values paid on surrender of life insurance policies. Unless you can present convincing evidence that this deduction should be allowed your license will not be issued

until the 4% gross premium tax is paid on said amount."

That on the 19th day of March, 1942, plaintiff paid to the defendant Insurance Commissioner the sum of $2936.33, representing a premium tax of 4% upon the item of $73,408.21 covering cancellations to policy holders as disclosed by the report of plaintiff above set forth.

7

The payments of the premium tax as recited in the preceding paragraphs 5 and 6 were made by plaintiff involuntarily under duress, compulsion, and pursuant to the demands of the defendant Insurance Commissioner, and to avoid the statutory forfeiture, penalties, revocation of its agents' certificates of authority, and its debarment from transacting its business in Oklahoma, and to prevent threatened deprivation and loss of its rights, interests, investments, and property within the State of Oklahoma. At the time such payments were made, plaintiff served notice according to law upon each of the defendants that such payments were made under protest, receipt of which notices were acknowledged by each of said defendants, as shown by such notices of protest, copies of which, marked "Exhibit A" and "Exhibit B", are hereto attached.
[fol. 48] The defendants and each of them have failed and refused to repay to plaintiff the fund so paid under protest, or any part thereof, but the amount thereof in the total sum of $6238.94 is now held by the defendant Insurance Commissioner or is held by the defendant State Treasurer. Said funds are now and at all times subsequent to the payment thereof by plaintiff as aforesaid have been held separate and apart from all other funds or taxes collected by the defendants or either of them, and are now available to be repaid to this plaintiff in the event judgment be rendered in its favor.

9

During the month of October, 1919, the plaintiff qualified as a foreign life insurance company and was admitted to do business within the State of Oklahoma. Subsequent to that date plaintiff has continued to do business in the State of Oklahoma and has paid an annual license fee of $200.00 each year from 1919 to 1942, both years inclusive, as required by

the Constitution and statutes of Oklahoma. Plaintiff has paid all taxes and fees lawfully assessed or imposed by the State of Oklahoma and in all respects has complied fully with all the requirements of the statutes of Oklahoma.

10

In conduct of its business and through the efforts of its agents and representatives within the State of Oklahoma, plaintiff has obtained a large number of policy holders, built up good will and established a successful and valuable life insurance business within said state. It has assembled at great expense information and records respecting its policy holders and business within said state. A substan- [fol. 49] tial part of plaintiff's assets and business within Oklahoma are in their nature personal to plaintiff, without use or value to others, and are not subject to lease or sale to others. If plaintiff were to be deprived of the privilege of doing business within the State of Oklahoma, or subjected to the illegal taxes and impositions as threatened by the provisions of House Bill No. 353, and the acts and conduct of the defendants aforesaid, it would suffer irreparable loss and injury, be deprived of the equal protection of the laws and of its property without due process of law, as more fully hereinafter set forth.

11

Insurance companies incorporated and existing under and by virtue of the laws of the State of Oklahoma, being resident or domestic corporations as distinguished from foreign or non-resident corporations subject to the provisions of House Bill No. 353, have been at all times authorized to issue contracts or policies of insurance identical in effect with those issued by this plaintiff. Said domestic insurance companies in all respects conducted their business substantially as the plaintiff and all other insurance companies conduct their business. There is no material distinction between domestic insurance companies and foreign insurance companies, and there is no reasonable basis upon which domestic insurance companies can be classified as separate and distinct from foreign insurance companies except upon the basis that the domestic companies are chartered to do business by the State of Oklahoma and foreign insurance companies are chartered to do business by states

other than the State of Oklahoma. By the specific terms of House Bill No. 353, domestic insurance companies are ex-
[fol. 50] cepted from the provisions thereof and are not required to pay a tax of 4% or at any other rate upon the premiums collected by such companies within Oklahoma. Said House Bill No. 353 is a revenue-producing measure enacted for the specific purpose of providing general funds for the maintenance and operation of the government of the State of Oklahoma and for the purpose of providing funds for the Firemen's Relief and Pension Fund of the State of Oklahoma. Said House Bill No. 353 is not a regulatory measure enacted under and by virtue of the police power of Oklahoma, nor are the funds demanded commensurate with the expense of inspecting, investigating, or regulating the affairs of the plaintiff or of other foreign insurance companies so qualified within Oklahoma. Said House Bill No. 353, unconstitutionally and in violation of the Constitution of the United States and the various amendments thereto, discriminates between foreign and domestic corporations to the advantage of the latter and to the prejudice of the former. Said House Bill No. 353 specifically violates the provisions of the Fourteenth Amendment to the Constitution of the United States of America in that it denies to this plaintiff which is within the jurisdiction of the State of Oklahoma the equal protection of the laws, in that domestic corporations receive an exemption from an onerous tax burden which is imposed solely upon foreign insurance companies merely because they happen to be foreign instead of domestic insurance companies. Said House Bill No. 353 deprives this plaintiff of property without due process of law in violation of the Fifth Amendment of the Constitution of the United States of America."

The provision of Section 1, Article XIX, of the Oklahoma Constitution that:

> [fol. 51] "No foreign insurance company shall be granted a license and permit to do business in this State until * * * (it) shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the legislature on foreign insurance companies"

is in violation of the Constitution of the United States in that it attempts to exact as a condition on the corporations engaging in business within the State of Oklahoma that such

foreign insurance corporations' rights secured to it by the Constitution of the United States be waived or ignored.

12

The foregoing taxes purportedly imposed upon premiums collected by foreign insurance companies in Oklahoma by Section 1, Chapter 1a, House Bill No. 353, Session Laws 1941, and said Act, are each unconstitutional and void for the further reason that the premium taxes are diverted by said Act to uses and purposes not authorized by the Constitution and laws of Oklahoma and in a manner not authorized by the Constitution and laws of Oklahoma.

13

The tax so paid under protest is illegal and the law provides no appeal from the aforesaid demands and actions of the defendant Insurance Commissioner. It is the duty of the defendants and each of them, as provided by law, to hold such taxes separate and apart from all other taxes collected until the final determination of this suit.

[fol. 52] Second Cause of Action

In the event of a judicial determination that said House Bill No. 353 and the premium tax imposed thereby is constitutional and enforceable against this plaintiff, then and only in that event plaintiff avers:

1

Plaintiff makes a part hereof as if fully set forth at length all of the allegations of its first cause of action.

2

House Bill No. 353 became effective on April 25th, 1941. Section 10478, Oklahoma Statutes 1931, amended by said House Bill No. 353, imposed a 2% premium tax. House Bill No. 353 imposed a 4% premium tax.

3

The following table discloses the amount of gross premiums received by plaintiff, dividends to policy holders of plaintiff, and cancellations to policy holders of plaintiff within the State of Oklahoma for the periods before and

after the effective date of House Bill No. 353 during the calendar year 1941, to-wit:

[fol. 53]

	Jan. 1, 1941 to and including Apr. 24, 1941	Apr. 25, 1941, to and including Dec. 31, 1941	Entire Calendar year 1941
Total amount of gross premiums received	$60,097.43	$96,799.76	$156,897.19
Less:			
Dividends to policy holders	319.18	604.62	923.80
Cancellations to policy holders	17,419.19	55,989.02	73,408.21
Total deductions	$17,738.37	$56,593.64	$74,332.01
All premiums collected after deducting all cancellations and dividends to policy holders	$42,359.06	$40,206.12	$82,565.18

4

The defendant Insurance Commissioner demanded, as set forth in plaintiff's first cause of action; that plaintiff pay a tax of 4% upon said sum of $156,897.19, constituting the total amount of gross premiums received during the entire calendar year 1941, less the said sum of $923.80 constituting dividends to policy holders during the entire calendar year 1941. The plaintiff paid the amount of such tax in the total [fol. 54] sum of $6238.94 at the time, in the manner, and for the reasons as set forth in plaintiff's first cause of action.

5

The said amount of cancellations to policy holders of plaintiff during the calendar year 1941, as set forth in paragraph 3, consists of the return of premiums, including cash surrender values, paid to policy holders according to the terms and provisions of life insurance contracts, upon the surrender, return and cancellation of such contracts, and is a proper and lawful deduction from the amount of the premiums received by plaintiff in the State of Oklahoma during the calendar year 1941, in calculating the tax imposed under the provisions of either Section 10478, Oklahoma Statutes 1931, or House Bill No. 353. Plaintiff contends that the words of said statutes, exempting from the tax thereby imposed "all cancellations and dividends to policy holders" must necessarily include surrender values, return to premiums, and all considerations paid to policy holders upon the surrender, return, and cancellation of the contract of insurance.

The tax imposed by House Bill No. 353 under no circumstances could be legally and lawfully applicable to the business done by this plaintiff prior to April 25th, 1941, the effective date of said Act. Said Act as construed by the defendants and each of them is illegal, void, and unconstitutional, and results in an attempt by the defendants and each of them to take plaintiff's property without due process of law, in violation of the Constitution of the United States of America.

[fols. 55-67] Wherefore, Plaintiff prays that it have and recover judgment against the defendants, and each of them, in the amount of $6238.94, and for the costs of this action, and for such other and further relief as may be just and proper in the premises.

Miley, Hoffman, Williams, France & Johnson, Attorneys for the plaintiff.

Filed in District Court Oklahoma County, Okla., March 8, 1943.

Cliff Myers, Court Clerk, by Edna Adams, Deputy.

(Exhibits "A" and "B" to amended petition are omitted in printing as they are duplicates of exhibits attached to original petition.)

[fol. 68] In the District Court of Oklahoma County

[Title omitted]

Second Amended Petition—Filed August 27, 1942

Comes now The Lincoln National Life Insurance Company, a corporation, plaintiff, and leave of court being first obtained, files this, its second amended petition, herein, and respectfully avers:

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana, with its principal place of business at Fort Wayne in said state, and is now and has been for many years engaged in the life insurance business. The defendant Jess G. Read is the duly elected, qualified, and acting Insurance Commissioner of the State of Oklahoma. The defendant Carl B.

Sebring is the duly elected, qualified, and acting State Treasurer of the State of Oklahoma.

[fol. 69] First Cause of Action

Section 1, Chapter 1a, Title 36, Session Laws of Oklahoma 1941, otherwise known as House Bill No. 353 (Sec. 104, Title 36, Oklahoma Statutes 1941), effective on April 25th, 1941, provides as follows:

"Section 1. That Section 10478, Oklahoma Statutes of 1931 be and is hereby amended to read as follows:

"'Every foreign insurance company, copartnership, association, inter-insurance exchange or individual who is a nonresident of the State of Oklahoma, doing business in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted which tax, in addition to [fol. 70] an annual tax of three dollars ($3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma Statutes, 1931, shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars ($500.00); and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the In-

surance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State.' "

2

Section 10478, Oklahoma Statutes of 1931, provides as follows:

"Every foreign insurance company doing business in this State under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the insurance commissioner, the total amount of gross premiums re- [fol. 71] ceived in this State within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same time pay to the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the insurance commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State."

3

Plaintiff on the 28th day of February, 1942, delivered to the defendant Jess G. Read, The Insurance Commissioner of the State of Oklahoma, its written report under

[fol. 72] oath according to the requirements of the statutes of Oklahoma; that said report is on file in the office of said defendant and is by reference to such record made a part hereof. Said report discloses the following transactions of plaintiff in the State of Oklahoma during the calendar year 1941, to-wit:

Total amount of gross premiums received		$156,897.19
Less:		
Dividends to policy holders	$ 923.80	
Cancellations to policy holders	73,408.21	74,332.01
All premiums collected after deducting all cancellations and dividends to policy holders		$ 82,565.18

4

Said House Bill No. 353 provides that any company failing to pay the premium tax as provided therein shall be subject to certain forfeitures and penalties, debarred from transacting any business of insurance in the State of Oklahoma until said taxes and penalties are fully paid, and revocation of the certificate of authority granted to the agents of that company to transact business in the State of Oklahoma.

5

At the time of filing its said report, plaintiff paid to the defendant Insurance Commissioner the sum of $3302.61, representing a premium tax of 4% upon the item of $82,565.18 disclosed by the report of plaintiff as above set forth.

6

[fol. 73] Plaintiff received a letter under date of March 3d, 1942, from the defendant Insurance Commissioner, acknowledging receipt of plaintiff's annual statement together with attached forms, and wherein said defendant advised plaintiff as follows, to-wit:

> "I do not believe that you are entitled to deduct as cancellations $73,408.21 representing cash values paid on surrender of life insurance policies. Unless you can present convincing evidence that this deduction should be allowed your license will not be issued

until the 4% gross premium tax is paid on said amount."

That on the 19th day of March, 1942, plaintiff paid to the defendant Insurance Commissioner the sum of $2936.33, representing a premium tax of 4% upon the item of $73,408.21 covering cancellations to policy holders as disclosed by the report of plaintiff above set forth.

7

The payments of the premium tax as recited in the preceding paragraphs 5 and 6 were made by plaintiff involuntarily under duress, compulsion, and pursuant to the demands of the defendant Insurance Commissioner, and to avoid the statutory forfeiture, penalties, revocation of its agents' certificate of authority, and its debarment from transacting its business in Oklahoma, and to prevent threatened deprivation and loss of its rights, interests, investments, and property within the State of Oklahoma. At the time such payments were made, plaintiff served [fol. 74] notice according to law upon each of the defendants that such payments were made under protest, receipt of which notices were acknowledged by each of said defendants, as shown by such notices of protest, copies of which, marked "Exhibit A", and "Exhibit B" are hereto attached.

8

The defendants and each of them have failed and refused to repay to plaintiff the fund so paid under protest, or any part thereof, but the amount thereof in the total sum of $6238.94 is now held by the defendant Insurance Commissioner or is held by the defendant State Treasurer. Said funds are now and at all times subsequent to the payment thereof by plaintiff as aforesaid have been held separate and apart from all other funds or taxes collected by the defendants or either of them, and are now available to be repaid to this plaintiff in the event judgment be rendered in its favor.

9

During the month of October, 1919, the plaintiff qualified as a foreign life insurance company and was admitted to do business within the State of Oklahoma. Subsequent to

that date plaintiff has continued to do business in the State of Oklahoma and has paid an annual license fee of $200.00 per year from 1919 to 1942, both years inclusive, as required by the Constitution and Statutes of Oklahoma. Plaintiff has paid all taxes and fees lawfully assessed or imposed by the State of Oklahoma and in all respects has complied fully with all the requirements of the statutes of Oklahoma.

10

In the conduct of its business and through the efforts [fol. 75] of its agents and representatives within the State of Oklahoma, plaintiff has obtained a large number of policy holders, built up good will and established a successful and valuable life insurance business within said state. It has assembled at great expense information and records respecting its policy holders and business within said state. A substantial part of plaintiff's assets and business within Oklahoma are in their nature personal to plaintiff, without use or value to others, and are not subject to lease or sale to others. If plaintiff were to be deprived of the privilege of doing business within the State of Oklahoma, or subjected to the illegal taxes and impositions threatened by the provisions of House Bill No. 353, and the acts and conduct of the defendants aforesaid, it would suffer irreparable loss and injury, be deprived of the equal protection of the laws and of its property without due process of law, as more fully hereinafter set forth.

11

Insurance companies incorporated and existing under and by virtue of the laws of the State of Oklahoma, being resident or domestic corporations as distinguished from foreign or non-resident corporations subject to the provisions of House Bill No. 353, have been at all times authorized to issue contracts or policies of insurance identical in effect with those issued by this plaintiff. Said domestic insurance companies in all respects conducted their business substantially as the plaintiff and all other insurance companies conduct their business. There is no material distinction be- [fol. 76] tween domestic insurance companies and foreign insurance companies and there is no reasonable basis upon which domestic insurance companies can be classified as separate and distinct from foreign insurance companies

except upon the basis that the domestic companies are chartered to do business by the State of Oklahoma and foreign insurance companies are chartered to do business by states other than the State of Oklahoma. By the specific terms of House Bill No. 353, domestic insurance companies are excepted from the provisions thereof and are not required to pay a tax of 4% or at any other rate upon the premiums collected by such companies within Oklahoma. Said House Bill No. 353 is a revenue-producing measure enacted for the specific purpose of providing general funds for the maintenance and operation of the government of the State of Oklahoma and for the purpose of providing funds for the Firemen's Relief and Pension Fund of the State of Oklahoma. Said House Bill No. 353 is not a regulatory measure enacted under and by virtue of the police power of Oklahoma, nor are the funds demanded commensurate with the expense of inspecting, investigating, or regulating the affairs of the plaintiff or of other foreign insurance companies so qualified within Oklahoma. Said House Bill No. 353, unconstitutionally and in violation of the Constitution of the United States and the various amendments thereto, discriminates between foreign and domestic corporations to the advantage of the latter and to the prejudice of the former. Said House Bill No. 353 specifically violates the provisions of the Fourteenth Amendment to the Constitution of the United States of America, in that it denies to this plaintiff which is within the juris-[fol. 77] diction of the State of Oklahoma the equal protection of the laws, in that domestic corporations receive an exemption from an onerous tax burden which is imposed solely upon foreign insurance companies merely because they happen to be foreign instead of domestic insurance companies. Said House Bill No. 353 deprives this plaintiff of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States of America.

The provision of Section 1, Article XIX of the Oklahoma Constitution that:

> "No foreign insurance company shall be granted a license and permit to do business in this State until * * * (it) shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the legislature on foreign insurance companies"

is in violation of the Constitution of the United States in that it attempts to exact as a condition on the corporations engaging in business within the State of Oklahoma that such foreign insurance corporation's rights secured to it by the Constitution of the United States be waived or ignored.

12

The foregoing taxes purportedly imposed upon premiums collected by foreign insurance companies in Oklahoma by Section 1, Chapter 1a, House Bill No. 353, Session Laws 1941, and said Act, are each unconstitutional and void for the further reason that the premium taxes are diverted by said Act to uses and purposes not authorized by the Con- [fol. 78] stitution and laws of Oklahoma and in a manner not authorized by the Constitution and laws of Oklahoma.

13

The tax so paid under protest is illegal and the law provides no appeal from the aforesaid demands and actions of the defendant Insurance Commissioner. It is the duty of the defendants and each of them, as provided by law, to hold such taxes separate and apart from all other taxes collected until the final determination of this suit.

Second Cause of Action

In the event of a judicial determination that said House Bill No. 353 is constitutional, or that the premium tax imposed by either the said House Bill No. 353 or Section 10478, Oklahoma Statutes 1931, is enforceable against this plaintiff, then and only in that event plaintiff avers:

1

Plaintiff makes a part hereof as if fully set forth at length all of the allegations of its first cause of action.

2

The amount of cancellations to policy holders of plaintiff during the calendar year 1941, as set forth in paragraphs 3 and 6 of plaintiff's first cause of action, consists of the return of premiums, including cash surrender values, paid to policy holders according to the terms and provisions of life insurance contracts, upon the surrender, return, and cancellation of such contracts, and is a proper and lawful [fol. 79] deduction from the amount of the premiums re-

ceived by plaintiff in the State of Oklahoma during the calendar year 1941, in calculating the tax imposed under the provisions of either Section 10478, Oklahoma Statutes 1931, or House Bill No. 353. Plaintiff contends that the words of said statutes, exempting from the tax thereby imposed "all cancellations and dividends to policy holders" must necessarily include surrender values, return of premiums, and all considerations paid to policy holders upon the surrender, return, and cancellation of the contract of insurance.

Third Cause of Action

In the event of a judicial determination that said House Bill No. 353 and the premium tax imposed thereby is constitutional and enforceable against this plaintiff, then and only in that event plaintiff avers:

1

Plaintiff makes a part hereof as if fully set forth at length all of the allegations of its first cause of action.

2

House Bill No. 353 became effective on April 25th, 1941. Section 10478, Oklahoma Statutes 1931, amended by said House Bill No. 353, imposed a 2% premium tax. House Bill No. 353 imposes a 4% premium tax.

3.

The following table discloses the amount of gross premiums received by plaintiff, dividends to policy holders of [fol. 80] plaintiff, and cancellations to policy holders of plaintiff within the State of Oklahoma for the periods before and after the effective date of House Bill No. 353 during the calendar year 1941, to-wit:

	Jan. 1, 1941 to and including Apr. 24, 1941	Apr. 24, 1941, to and including Dec. 31, 1941	Entire Calendar year 1941
Total amount of gross premiums received	$60,097.43	$96,799.76	$156,897.19
Less:			
Dividends to policy holders	319.18	604.62	923.80
Cancellations to policy holders	17,419.19	55,989.02	73,408.21
Total deductions	$17,738.37	$56,593.64	$74,332.01
All premiums collected after deducting all cancellations and dividends to policy holders	$42,359.06	$40,206.12	$82,565.18

[fol. 81] 4

The defendant Insurance Commissioner demanded, as set forth in plaintiff's first cause of action, that plaintiff pay a tax of 4% upon said sum of $156,897.19, constituting the total amount of gross premiums received during the entire calendar year 1941, less the said sum of $923.80 constituting dividends to policy holders during the entire calendar year 1941. The plaintiff paid the amount of such tax in the total sum of $6238.94 at the time, in the manner, and for the reasons as set forth in plaintiff's first cause of action.

5

The tax imposed by House Bill No. 353 under no circumstances could be legally and lawfully applicable to the business done by this plaintiff prior to April 25th, 1941, the effective date of said Act. Said Act as construed by the defendants and each of them is illegal, void, and unconstitutional, and results in an attempt by the defendants and each of them to take plaintiff's property without due process of law, in violation of the Constitution of the United States of America.

Wherefore, plaintiff prays that it have and recover judgment against the defendants, and each of them, in the amount of $6238.94, and for the costs of this action, and for such other and further relief as may be just and proper in the premises.

Miley, Hoffman, Williams, France & Johnson, Attorneys for the Plaintiff.

[fols. 82-91] Order Granting Leave to File

Leave is hereby granted to file the above and foregoing Second Amended Petition this 27 day of August, 1942.

Albert C. Hunt, District Judge.

(Exhibits "A" and "B" to second amended petition are omitted in printing as they are duplicates of exhibits attached to original petition.)

[fol. 92] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

DEMURRER—Filed August 29, 1942

Come Now the above named defendants and demur to the *Second Amended Petition* of plaintiff herein, and for ground of objection state:

(1) That this Court has no jurisdiction of the subject of the action;

(2) That this action is in reality a suit against the State of Oklahoma and hence cannot be maintained for the reason that there is no legislative enactment authorizing the State to be sued; and

[fols. 93-95] (3) That the Petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendants.

(Signed:) Mac Q. Williamson, Attorney General, Fred Hansen, Assistant Attorney General, Attorneys for Defendants.

[File endorsement omitted]

[fol. 96] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

No. 105,488.

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, a Corporation, Plaintiff,

vs.

JESS G. READ, The Insurance Commissioner of the State of Oklahoma; and CARL B. SEBRING, State Treasurer of the State of Oklahoma, Defendants

JOURNAL ENTRY OF JUDGMENT—Filed September 14, 1942

Now on this, the 8th day of September, 1942, the above cause came on for hearing upon defendants' demurrer to the second amended petition of plaintiff, both parties being

present by their respective attorneys of record; and the Court having examined the pleadings and having heard the argument of Counsel, asked both parties to file briefs, and took the case under advisement.

Now on this, the 11th day of September, 1942, said briefs having been filed and considered, this cause came on for decision upon said demurrer, the parties appearing, as [fol. 97] aforesaid, and the Court being fully advised in the premises, and in consideration thereof, finds that neither Section 2, Article 19 of the Constitution of Oklahoma, Section 10478, Oklahoma Statutes 1931, or House Bill No. 353 of the 18th Oklahoma Legislature (Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941), nor the construction or application thereof by the Insurance Commissioner of Oklahoma referred to in plaintiff's second amended petition, violate the 14th Amendment of the Constitution of the United States or the Constitution of Oklahoma, and that neither said petition nor the 1st, 2nd or 3rd causes of action thereof state facts sufficient to constitute a cause of action in favor of plaintiff and against defendants, or either of them, and that hence defendants' demurrer to said petition and to each of its said causes of action should be sustained.

The Court further finds, in relation to said *First cause of action*, that under the pertinent constitutional and statutory provisions of this State, as construed in the case of New York Life Insurance Company v. Board of Commissioners of Oklahoma County, 155 Okla. 247, 9 Pac. (2d) 636, and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice:

(a) where a foreign insurance company desires, for the [fol. 98] first time, to enter Oklahoma and to do business therein, it is required, among other things, to file an application for a license to enter Oklahoma and do business therein to and including the succeeding last day of February, and to pay, on or before said date, a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it receives in Oklahoma after it so enters the same and prior to the succeeding first day of January; that said tax is paid for the right or privilege of so

entering Oklahoma and doing business therein to and including said last day of February, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms on said date, and

(b) when such a licensed company desires to enter Oklahoma and do business therein during the ensuing license year (March 1 to and including the suceeding last day of February), it is required, among other things, to file on or before the last of February of the current license year, an application for a license to enter Oklahoma and do business therein during said ensuing license year, and, as a condition precedent, to show pay-
[fol. 99] ment of a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, which payment was made for the privilege of having been permitted to enter Oklahoma and to do business therein during the then current license year, and to pay, on or before the last day of February of said ensuing license year, a similar tax on all premiums, less proper deductions, which it receives in Oklahoma during the preceding calendar year; that said tax is paid for the right or privilege of having been permitted to enter Oklahoma and to do business therein during said ensuing license year, and that the license issued by the Insurance Commissioner to said Company expires by operation of law and its express terms at the end of said year.

The Court also finds, in relation to said *second cause of action*, that under the pertinent constitutional and statutory provisions of this State and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice, the words "after all cancellations are deducted" as used in Sec-
[fol. 100] tion 2, Article 19, of the Constitution of Oklahoma, and the words "after all cancellations and dividends to policyholders are deducted," as used in Section 10478, Oklahoma Statutes 1931, and Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, do not refer to or include cash surrender values paid by licensed foreign

life insurance companies in this State to their Oklahoma policyholders.

The Court further finds, in relation to said *third cause of action*, that under the express provisions of Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, and the uniform administrative practice of the State Insurance Commissioner since April 25, 1941, the effective date of said Act, said administrative practice being a matter of common knowledge of which the Court will take judicial notice, the annual four per cent tax on premiums referred to in said section is levied and should be collected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, "within the twelve months next preceding the first day of January," 1942, as well as on all premiums, less proper deductions, received by said companies after said date.

It is Therefore Ordered, Adjudged and Decreed by the Court that defendants' demurrer to plaintiff's second amended petition in the above cause be and the same is hereby sustained, to which findings and order plaintiff [fol. 101] excepted, which exceptions are duly allowed. Thereupon, plaintiff announced in open court its intention to stand upon its said petition, and to refuse to plead further.

It is Therefore Ordered, Adjudged and Decreed by the Court that the above case be dismissed at the cost of plaintiff, to which ruling and judgment of the Court plaintiff excepted, and its exceptions are duly allowed.

Thereupon, in open court, plaintiff gave notice of its intention to appeal to the Supreme Court of the State of Oklahoma, and, upon application of plaintiff and for good cause shown, it is ordered and adjudged by the Court that plaintiff be granted 30 days' time in addition to the time allowed by law to make and serve case-made on appeal to the Supreme Court of Oklahoma in said cause, defendants to have three (3) days thereafter in which to suggest amendments, the case-made to be signed and settled upon three (3) days' notice by either party.

Approved as to Form:

(Signed) Miley, Hoffman, Williams, France & Johnson, Atty. for Plaintiff. (Signed) Fred Hansen, Asst. Atty. Gen., Atty. for Defendants. (Signed) Lucius Babcock, District Judge.

[fols. 102-117] [File endorsement omitted.]

[fol. 118] IN THE DISTRICT COURT OF OKLAHOMA COUNTY

[Title omitted]

ORDER OF REVIVOR—Filed March 4, 1943

Now on this 4th day of Mar., 1943, the motion for revivor of the plaintiff and A. S. J. Shaw, State Treasurer of Oklahoma, comes on for hearing; and the Court, being fully advised in the premises, finds that subsequent to the order and judgment of this Court entered herein on the 11th day of September, 1942, the defendant Carl B. Sebring, State Treasurer of the State of Oklahoma, has been succeeded in said office by A. S. J. Shaw; that A. S. J. Shaw is now the duly elected, qualified and acting State Treasurer of the State of Oklahoma, and that said motion should be sustained.

[fol. 119] It is Therefore Ordered and Adjudged that the action of the plaintiff against the defendant Carl B. Sebring, State Treasurer of the State of Oklahoma, be revived against his successor in office, A. S. J. Shaw, State Treasurer of the State of Oklahoma, and that A. S. J. Shaw, State Treasurer of the State of Oklahoma, be, and he is hereby made a party to the said order and judgment in the place and stead of Carl B. Sebring, State Treasurer of the State of Oklahoma, in the manner and to the same extent as though originally a party defendant herein, and all further proceedings herein be in the name of A. S. J. Shaw, State Treasurer of the State of Oklahoma.

O. K.:

(Signed) Miley, Hoffman, Williams, France & Johnson, Attorneys for the Plaintiff.

O. K.:

(Signed) Mac Q. Williamson, Atty. Gen. of Okla. Fred Hansen, Asst. Atty. Gen. Attorney for the Defendants Jess G. Read, The Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma.

(Signed) Lucius Babcock, Judge of the District Court in and for Oklahoma County, Oklahoma.

[fols. 120-128] [File endorsement omitted.]

[fol. 128a] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, a Corporation, Plaintiff in Error,

vs.

JESS G. READ, The Insurance Commissioner of the State of Oklahoma; and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error

No. 31338

PETITION IN ERROR—Filed March 8, 1943

Said plaintiff in error, The Lincoln National Life Insurance Company, a corporation, complains of said defendants in error, Jess G. Read, The Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, for the reason that on the 11th day of September, 1942, in an action then pending in the District Court of the State of Oklahoma in and for Oklahoma County, wherein the said plaintiff in error was plaintiff, and said Jess G. Read, The Insurance Commissioner of the State of Oklahoma, defendant in error, and Carl B. Sebring, State Treasurer of the State of Oklahoma, were defendants, said Court rendered an order sustaining said 'defendants' demurrer to plaintiff's second amended petition in said cause, and a judgment dismissing said case. A. S. J. Shaw, State Treasurer of the State of Oklahoma, is named as defendant in error herein, in the place and stead of said defendant Carl B. Sebring, State Treasurer of the State of Oklahoma, according to the order of revivor entered by said Court.

[fol. 128b] The original case made, duly signed, attested, and filed, and a certified transcript of the record of said Court, is hereto attached, marked "Exhibit A" and made a part of this petition in error.

The plaintiff in error, The Lincoln National Life Insurance Company, a corporation, avers that there is error in the said record, and proceedings in this, to-wit:

1. Said Court erred in sustaining the demurrer of said defendants to the second amended petition of plaintiff in error.

2. Said Court erred in sustaining the demurrer of said defendants to the first cause of action contained in the second amended petition of plaintiff in error.

3. Said Court erred in sustaining the demurrer of said defendants to the second cause of action contained in the second amended petition of plaintiff in error.

4. Said Court erred in sustaining the demurrer of said defendants to the third cause of action contained in the second amended petition of plaintiff in error.

5. Said Court erred rendering the findings contained in said order and judgment.

6. Said Court erred in finding that Section 2, Article 19, of the Constitution of Oklahoma does not violate the Fourteenth Amendment of the Constitution of the United States.

7. Said Court erred in finding that Section 10478, Oklahoma Statutes of 1931, does not violate the Fourteenth Amendment of the Constitution of the United States.

[fol. 128c] 8. Said Court erred in finding that Section 10478, Oklahoma Statutes of 1931, does not violate the Constitution of Oklahoma.

9. Said Court erred in finding that House Bill No. 353 of the Eighteen Oklahoma Legislature (Chap. 1a, Tit. 36, p. 121; Oklahoma Session Laws, 1941) does not violate the Fourteenth Amendment of the Constitution of the United States.

10. Said Court erred in finding that House Bill No. 353 of the Eighteenth Oklahoma Legislature (Chap. 1a, Tit. 36, p. 121, Oklahoma Session Laws, 1941) does not violate the Constitution of Oklahoma.

11. Said Court erred in finding that the Construction or application of Section 2, Article 19, Constitution of Oklahoma; Section 10478, Oklahoma Statutes 1931; or House Bill No. 353 of the Eighteenth Oklahoma Legislature (Chap. 1a, Tit. 36, p. 121, Oklahoma Session Law, 1941) by the Insurance Commissioner of Oklahoma, referred to in plaintiff's second amended petition, does not violate the Fourteenth Amendment of the Constitution of the United States.

12. Said Court erred in finding that the construction or application of Section 2, Article 19, Constitution of Okla-

homa; Section 10478, Oklahoma Statutes 1931; or House Bill No. 353 of the Eighteenth Oklahoma Legislature (Chap. 1a, Titl. 36, p. 121, Oklahoma Session Laws, 1941) by the Insurance Commissioner of Oklahoma, referred to in plaintiff's second amended petition, does not violate the Constitution of Oklahoma.

[fol. 128d] 13. Said Court erred in its findings contained in said order and judgment of September 11th, 1942, in relation to the first cause of action contained in the second amended petition of plaintiff in error.

14. Said Court erred in its findings contained in said order and judgment of September 11th, 1942, in relation to the administrative practices of the State Insurance Commissioner.

15. Said Court erred in finding that such administrative practices of the State Insurance Commissioner are a matter of common knowledge.

16. Said Court erred in taking judicial notice of such administrative practies of the State Insurance Commissioner.

17. Said Court erred in its findings contained in said order and judgment of September 11th, 1942, in relation to the second cause of action contained in the second amended petition of plaintiff in error.

18. Said Court erred in finding in said order and judgment of September 11th, 1942, that the words "after all cancellations are deducted" as used in Section 2, Article 19 of the Constitution of Oklahoma, and the words "after all cancellations and dividends to policyholders are deducted," as used in Section 10478, Oklahoma Statutes 1931, and Section, Chapter 1*a*, Title 36, page 121, Oklahoma Session Laws 1941, do not refer to or include cash surrender values paid by licensed foreign life insurance companies in this State to their Oklahoma policyholders.

[fol. 128e] 19. Said Court erred in its findings contained in said order and judgment of September 11th, 1942, in relation to the third cause of action contained in the second amended petition of plaintiff in error.

20. Said Court erred in finding in said order and judgment of September 11th, 1942, that the annual 4% tax on premiums referred to in Section 1, Chapter 1a, Title 36,

page 121, Oklahoma Session Laws 1941, is levied and should be collected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, "within the 12 months next preceding the first day of January," 1942, as well as on all premiums, less proper deductions, received by said companies after said date.

21. Said Court erred in rendering judgment that said case be dismissed.

22. Said Court erred in rendering the judgment and decree of September 11th, 1942, entered in favor of said defendants and against said plaintiff in error.

Wherefore, plaintiff in error prays that said order and judgment, and each of them, so rendered on September 11th, 1942, be reversed, set aside, and held for naught, and that plaintiff in error be restored to all right that it has lost by the rendition of said order and judgment; that the demurrer of defendants in error to the second amended petition of plaintiff in error be overruled; and for such other and further relief as to the Court may seem just.

Miley, Hoffman, Williams, France & Johnson, Attorneys for Plaintiff in Error.

[fol. 129] [File endorsement omitted]

IN THE SUPREME COURT OF OKLAHOMA

[Title omitted]

BRIEF OF PLAINTIFF IN ERROR—Filed July 12, 1943

Statement of Case

The Lincoln *Nation* National Life Insurance Company, plaintiff in error here and plaintiff below, and Jess G. Read, Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, defendants in error here and defendants below, will be referred to herein respectively as the Insurance Company, Insurance Commissioner, and State Treasurer, or as plaintiff and defendants as they appeared below.

[fol. 130] 3. The laws of Oklahoma imposing a tax of 4% upon premiums collected by foreign insurance companies

discriminate between foreign and domestic insurance corporations to the advantage of the latter and to the prejudice of the former. Although it is considered as admitted upon the demurrer that the 4% tax is a heavy discrimination against foreign insurance companies, we believe it not amiss to add for the information of the Court a statement to which we understand the defendants will readily agree, viz: That the tax of 4% of all premiums, less proper deductions, collected by the plaintiff insurance company in the State of Oklahoma, is not collected on like premiums of competing domestic insurance companies, and the only tax collected from said latter companies not collected from the plaintiff insurance company is a state income tax amounting to approximately one-twentieth of said 4% tax.

[fol. 131] [File endosement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

BRIEF OF DEFENDANTS IN ERROR—Filed August 16, 1943

Statement of Case

* * * * * * *

However, in order that the Court may not misunderstand defendants' conception of the discriminatory character of the premium tax involved here, both before and after it was increased in 1941 from two per cent to four per cent, we desire to state that we fully agree with plaintiff's statements on page 18 of its brief (same being in relation to matters of common knowledge in which the Court may take judicial notice) that

> [fols. 132-133] "the tax of 4% of all premiums, less proper deductions, collected by the plaintiff insurance company in the State of Oklahoma, is not collected on like premiums of competing domestic insurance companies and the only tax collected from said latter companies not collected from the plaintiff insurance company is a state income tax amount to approximately

one-twentieth of said 4% tax (or one-tenth of said 2% tax)."

and

"The expenses of the State Insurance Department since statehood until December 31st, 1941, have been approximately 3.55% of the amount collected from the former 2% premium tax and other receipts, and since said latter date said expenses have been approximately 2% of the amount collected from the present 4% premium tax and other receipts."

While this action only involves $6,238.94, the principles of law announced by this Court in its decision herein will effect the validity of Annual Taxes on the Oklahoma premiums of foreign insurance companies doing business in this State of Approximately $2,160,000.00.

[fols. 134-157] In Supreme Court of Oklahoma

No. 31338

The Lincoln National Life Insurance Company, a Corporation, Plaintiff in Error

vs.

Jess G. Read, the Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error.

Opinion—Filed April 18, 1944

(All of opinion except last three paragraphs is omitted in printing. Omitted portion is contained in opinion filed Nov. 21, 1944, side folios 182-203 post.)

[fols. 158-165] The petition alleged collection of premiums in 1941 before April 25th in the total amount of $60,097.43, and alleged dividends paid to policyholders during that time in the sum of $319.18, leaving $59,778.25 taxable under the law when collected at the rate of 2%, and no more. Therefore, plaintiff's petition as to the third cause of action stated facts sufficient to constitute a cause of action for the recovery of $1,195.57, but no more.

The order of the trial court in sustaining the demurrer to the first and second causes of action is affirmed.

The order sustaining the demurrer to the third cause of action and the judgment dismissing the petition are reversed and the cause remanded with directions to overrule the demurrer as to the third cause of action.

Concur: Corn, CJ., and Osborn, Bayless, Welch, Hurst, Davison and Arnold, JJ.

Dissent: Gibson, VCJ.

[fol. 166] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING—Filed May 18, 1944

Comes now The Lincoln National Life Insurance Company, plaintiff in error, and respectfully represents to the Court that on the 18th day of April, 1944, a decree and judgment was rendered by this Court in said cause. We quote the concluding two paragraphs of the Court's decision, to-wit:

> "The order of the trial court in sustaining the demurrer to the first and second causes of action is affirmed.
>
> "The order sustaining the demurrer to the third cause of action and the judgment dismissing the petition are reversed and the cause remanded, with directions to overrule the demurrer as to the third cause of action."

[fol. 167] Lincoln Nat'l Life Ins. Co. v. Read Et Al.

The first cause of action draws in question the validity of the 4% insurance premium tax statute of Oklahoma, on the ground of its being repugnant to the Constitution of the United States (C-M. 61-70).

The second cause of action is alleged in the event, and only in the event, of a judicial determination that the said 4% insurance premium tax statute is constitutional, or that either the 4% tax or the former 2% tax is enforceable (C-M. 70-71). It involves the contention that cash values paid to policyholders upon the surrender and cancellation of policies of life insurance are included in the deduction of "all cancellations" provided in the tax law in question.

The third cause of action is alleged in the event, and only in the event, of a judicial determination that said 4% insurance premium tax statute is constitutional (C-M. 71-73). It involves the contention that the increase of the tax from 2% to 4% should not operate as to premium income received prior to the effective date of the Act. The Court sustained this contention.

The demurrer goes to the petition as a whole. Defendants did not demur separately to each cause of action (C-M. 84-85).

Plaintiff in error makes a part hereof the brief hereto attached from which it is shown:

1. The decision of this Court, erroneously and contrary to the guaranties embodied in the Federal Constitution and the fundamental principles announced in decisions of the Supreme Court of the United States, upholds the imposition of a tax that admittedly discriminates against foreign insurance companies,

[fols. 168-176] Petition for Rehearing and Brief in Support

2. The decision of this Court erroneously holds that the payment of cash surrender values as provided for in life insurance policies is not a cancellation within the terms or within the meaning of the Constitution and statutes.

3. This Court apparently overlooks the fact that the demurrer is general to the entire petition. In view of the Court's holding that the petition as to the third cause of action is sufficient, the petition is good as against said general demurrer, and the order of the trial court sustaining the demurrer and the judgment dismissing the petition should be reversed.

Wherefore, plaintiff in error prays that a rehearing of said cause be granted.

Miley, Hoffman, Williams, France & Johnson, 10309 First National Building, Oklahoma City, Oklahoma, Attorneys for Plaintiff in Error.

[fols. 177-178] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

ORDER DENYING PETITION FOR REHEARING—Filed September 12, 1944

The clerk is hereby directed to enter the following orders:

September 12, 1944.

31338—The Lincoln National Life Ins. Co. v. Read, Ins. Comr. et al. Petition for rehearing denied.

N. S. Corn,
Chief Justice.

[fol. 179] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

JOINT MOTION AND STIPULATION—Filed November 14, 1944

Come now the plaintiff in error and defendants in error, as named in the above caption, and joining in this motion allege and state that the judgment and decision of this Court concludes as follows, to-wit:

> "The order of the trial court in sustaining the demurrer to the first and second causes of action is affirmed.
>
> "The order sustaining the demurrer to the third cause of action and the judgment dismissing the petition are reversed and the cause remanded, with directions to overrule the demurrer as to the third cause of action."

The parties further show that the petition for rehearing filed herein was denied by this Court on the 12th day of September, 1944; that the mandate of this Court has not issued, having been stayed by order of this Court heretofore entered herein.

[fol. 180] The parties further show that there exists no issue as to the facts set out in the petition of plaintiff in error, but that the facts therein stated are true and correct

and there is nothing to be gained by proceeding with the trial of this cause in the District Court of Oklahoma County, Oklahoma.

The parties further agree that the said third cause of action set out in the petition of plaintiff in error is alleged only in the event it be judicially determined that the premium tax law involved herein is constitutional, and the amount of the tax involved in said third cause of action and which plaintiff in error seeks to recover in such event is the sum of $847.18.

The parties further show that it is to the interest of all the parties hereto, and to the public interest, to effect a speedy and economical determination of this action.

Wherefore, the parties pray that this Court recall its judgment herein and completely determine and adjudicate this action, including the respective liability of the parties for costs.

Miley, Hoffman, France & Johnson, Attorneys for the Lincoln National Life Insurance Company, Plaintiff in Error. Fred Hansen, Assistant Attorney General; Attorney for Jess G. Read, the Insurance Commissioner of the State of Oklahoma and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error.

[fol. 181] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER WITHDRAWING OPINION—Filed November 20, 1944

The joint motion and stipulation of the parties herein having been heard and considered,

It is ordered that the opinion and decision of this Court entered and filed herein on the 18th day of April, 1944, and all orders of this Court thereafter entered and filed herein, be, and the same are hereby withdrawn and this cause is submitted for further consideration by this Court.

Dated this 20 day of November, 1944.

N. S. Corn, Chief Justice.

[fol. 182] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 31338

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, a Corporation, Plaintiff in Error,

vs.

JESS G. READ, the Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error

SYLLABUS

1. A state may, subject to paramount authority of the Federal Constitution, withhold from foreign corporations the privilege of doing business within the state, or grant such privilege on such conditions as the state may deem fit, provided such conditions do not require the surrender of rights guaranteed by the Federal Constitution.

2. A state may exact a gross premium tax from foreign insurance companies for the privilege of doing business within the state.

3. It is not an essential of a privilege tax exacted by a state from a foreign corporation for the privilege of doing business within the state that it be paid before the exercise of the privilege. Payment may precede or follow the exercise of the privilege.

4. The long-continued construction of a statute by department of government charged with its execution is entitled to great weight and should not be overturned without cogent reasons. Great Northern Life Insurance Company v. Read, Insurance Commissioner of Oklahoma, 136 Fed. 2d 44.

[fol. 183] 5. Payment of gross premium tax by foreign insurance companies on or before the expiration of the license year is exacted for the privilege of doing business within the State of Oklahoma during that license year and a showing that such tax has been paid is a condition precedent for the issuance of a license for the ensuing year.

6. It was within the power of the State of Oklahoma to change the requirements for the privilege of a foreign insurance company to do business within the State by increasing the rate of gross premium tax exacted for such privilege during the license year as to premiums collected after the effective date of the Act increasing the tax.

7. Imposition of gross premium tax on foreign insurance companies for the privilege of doing business within the State as provided by Sections 1 and 2 of Article 19 of the Constitution of the State of Oklahoma and Section 10478, O. S. 1931, and 36 O. S. 1941, Section 104, does not violate the 14th Amendment of the Federal Constitution, though no like tax is exacted from domestic insurance companies.

8. An insurance company's payment of cash surrender value of life insurance policies to the holders thereof and their surrender of the policies to the company does not effect cancellation of the policies within the meaning of Section 2, Article 19, of the Constitution and the statutes of Oklahoma requiring payment of a tax on all premiums collected in the State, "after all cancellations are deducted."

9. Statutes are to be construed as having a prospective operation unless the purpose and intention of the Legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used. In every case of doubt the doubt must be resolved against the retrospective effect. Good et al. v. Keel et al., 29 Okla. 325, 116 Pac. 777.

10. 36 O. S. 1941, Section 104, by which the rate of the gross premium tax on foreign insurance companies was increased from 2% to 4%, effective April 25, 1941, was not specifically, nor by necessary implication, retroactive so as to apply the increased tax to the premiums collected in the year 1941, prior to the 25th day of April of that year.

[fol. 184] APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

Honorable Lucius Babcock, Judge

Affirmed in Part and Reversed in Part

MILEY, HOFFMAN, WILLIAMS, FRANCE & JOHNSON, Oklahoma City, for Plaintiff in Error

MAC Q. WILLIAMSON, Attorney General, FRED HANSEN, Assistant Attorney General, and Andy Crosby, Jr., Oklahoma City, for Defendants in Error

OPINION—Filed November 21, 1944

RILEY, J.:

The Lincoln National Life Insurance Company is a corporation, organized under the laws of the State of Indiana, and is engaged in the life insurance business. Honorable Jess G. Read is the duly elected Insurance Commissioner of the State of Oklahoma.

On March 27, 1942, the Lincoln National Life Insurance Company, hereinafter referred to as plaintiff, commenced this action against Jess G. Read, Insurance Commissioner, and Carl B. Sebring, the then State Treasurer, hereinafter referred to as defendants, to recover the sum of $6,238.94 theretofore paid by plaintiff as the 4% premium or license tax, under the provisions of Sections 1 and 2, Article 19, of the Constitution of the State of Oklahoma, and Section 10478, O. S. 1931, as amended by Title 36, Chapter 1a, Session Laws 1941 (36 O. S. 1941, Section 104), and also referred to in the record as House Bill No. 353.

After the judgment herein reviewed was rendered, Honorable A. S. J. Shaw, who had in the meantime become State Treasurer, was substituted for Carl B. Sebring, State Treasurer, as party defendant. Plaintiff paid the license tax (or a part thereof) under protest, and brought this action to recover the entire amount of the taxes so paid. [fol. 185] Defendants' demurrer to plaintiff's second amended petition, consisting of three alleged causes of action, was sustained. Plaintiff elected to stand on the petition as amended, whereupon the court entered judgment dismissing the cause. Plaintiff appeals.

The first cause of action assails the validity of the annual tax of 2% on all premiums collected by plaintiff in the State under the provisions of Sections 1 and 2, Article 19, of the Constitution and Section 10478, O. S. 1931. A tax of 4% on such premiums was provided by Section 1, Chapter 1a, Title 36, Session Laws 1941 (36 O. S. 1941, Section 104), House Bill No. 353, supra, amendatory of Section 10478, effective April 25, 1941. These provisions of statute were construed by the State Insurance Commissioner and deemed applicable to the premiums collected by plaintiff in this State during the entire year of 1941.

Plaintiff alleges that the provisions of Sections 1 and 2, Article 19, of the Constitution of Oklahoma, and the statutory provisions, as construed and applied by the Insurance Commissioner, unlawfully discriminate against plaintiff and in favor of life insurance companies organized under the laws of the State of Oklahoma which are not required to pay a gross premium tax, or any other similar tax. Thereby it is alleged that there is violation of the 14th Amendment of the Constitution of the United States, and that plaintiff is deprived of equal protection of the law.

The second cause of action assails that part of the tax (if any other part thereof is valid) which was claimed by the State Insurance Commissioner and paid by plaintiff which represents 4% on $73,408.21 of plaintiff's premium collections, which plaintiff claims should have been deducted on account of cash surrender values paid to policyholders [fol. 186] upon surrender, return, and cancellation of policy contracts.

The third cause of action assails that part of the tax represented by the increase of the rate from 2% to 4% on premiums collected by plaintiff during the year 1941, and prior to April 25, 1941, the effective date of the Act amending Section 10478, supra.

Defendants' demurrer to the petition as amended is upon three grounds: (1) Want of jurisdiction in the court of the subject matter of the action; (2) that the suit is one against the State and that there is no legislative authority or grant of the right to sue the State; and (3) that the petition as amended does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant. The court sustained the demurrer upon the third ground. It is not contended here that either the first or second ground of the demurrer is well taken.

Section 1, Article 19, of the Constitution of the State of Oklahoma, provides:

> "No foreign insurance company shall be granted a license or permitted to do business in this State until it shall have complied with the laws of the State, including the deposit of such collateral or indemnity for the protection of its patrons within this State as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license."

Section 2 of Article 19 provides:

> "Until otherwise provided by law, all foreign insurance companies * * * shall pay to the Insurance Commissioner for the use of the State an entrance fee as follows:
>
> "Each foreign Life Insurance Company, per annum, two hundred dollars; * * *
>
> "Until otherwise provided by law, domestic companies excepted, each insurance company, including [fol. 187] surety and bond companies, doing business in this State, shall pay an annual tax of two per centum on all premiums collected in the State, after all cancellations are deducted, and a tax of three dollars on each local agent."

Section 10478, O. S. 1931 (first adopted in 1909), prior to 1941 amendment, provided:

> "Every foreign insurance company doing business in this State under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the insurance commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same time pay to the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected in this State,

after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the insurance commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State."

Said section, as amended in 1941, is substantially the same except the rate of the premium tax is 4% instead of 2%.

36 O. S. 1941, Section 56, provides that the Insurance Commissioner shall furnish each insurance company authorized to do business in the State blank forms upon which to make annual reports, and that such companies shall annually, on or before the last day of February, file with the Insurance Commissioner a statement under oath showing their financial condition as of December 31st of the previous year and:

[fol. 188] . . . . . if the Insurance Commissioner finds that the facts warrant, and that all laws applicable to said company are fully complied with, he shall issue to said company a license or certificate of authority, subject to all requirements and conditions of the law, to transact business in this State, specifying in said certificate the particular kind or kinds of insurance it is authorized to transact, and said certificate shall expire on the last day of February next after its issue. . . .

The trial court in sustaining the demurrer held:

. . . . . that neither Section 2, Article 19 of the Constitution of Oklahoma, Section 10478, Oklahoma

Statutes 1931, or House Bill 353 of the 18th Oklahoma Legislature (Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941), nor the construction or application thereof by the Insurance Commissioner of Oklahoma referred to in plaintiff's second amended petition, violate the 14th Amendment of the Constitution of the United States or the Constitution of Oklahoma, and that neither said petition nor the 1st, 2nd or 3rd causes of action thereof state facts sufficient to constitute a cause of action in favor of plaintiff and against defendants, or either of them, and that hence defendants' demurrer to said petition and to each of its said causes of action should be sustained. * * *

With reference to the first cause of action, the trial court held:

"* * * Under the pertinent constitutional and statutory provisions of this State, as construed in the case of New York Life Insurance Company *v.* Board of Commissioners of Oklahoma County, 155 Okla. 247, 9 Pac. (2d) 636, and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice:

"(A) When a foreign insurance company desires, for the first time, to enter Oklahoma and to do business therein, it is required, among other things, to file an application for a license to enter Oklahoma and do business therein to and including the succeeding last day of February, and to pay, on or before said date, a tax of two per centum (since April 25, 1941—four per centum) on all premiums less proper deductions, which it receives in Oklahoma after it so enters the same and prior to the succeeding first day of January; that said tax is paid for the right or privilege of so entering Oklahoma and doing business therein to and [fol. 189] including said last day of February, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms on said date, and

"(b) when such a licensed company desires to enter Oklahoma and do business therein during the ensuing

license year (March 1 to including the succeeding last day of February), it is required, among other things, to file on or before the last day of February of the current license year, an application for a license to enter Oklahoma and do business therein during said ensuing license year, and, as a condition precedent, to show payment of a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, which payment was made for the privilege of having been permitted to enter Oklahoma and to do business therein during the then current license year, and to pay, on or before the last day of February of said ensuing license year, a similar tax on all premiums, less proper deductions, which it receives in Oklahoma during the preceding calendar year; that said tax is paid for the right or privilege of having been permitted to enter Oklahoma and to do business therein during said ensuing license year, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms at the end of said year."

As to the second cause of action, the court held:

"* * * that under the pertinent constitutional and statutory provisions of this State and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice, the words 'after all cancellations are deducted' as used in Section 2, Article 19, of the Constitution of Oklahoma, and the words 'after all cancellations and dividends to policyholders are deducted,' as used in Section 10478, Oklahoma Statutes 1931, and Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, do not refer to or include cash surender values paid by licensed foreign life insurance companies in this State to their Oklahoma policyholders."

With reference to the third cause of action, the court held:

> "* * * that under the express provisions of Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, and the uniform administrative practice of the State Insurance Commissioner since April 25, 1941, the effective date of said Act, said adminis- [fol. 190] trative practice being a matter of common knowledge of which the Court will take judicial notice, the annual four per cent tax on premiums referred to in said section is levied and should be corrected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, 'within the twelve months next preceding the first day of January,' 1942, as well as on all premiums, less proper deductions, received by said companies after said date."

It has been the uniform administrative practice of the Insurance Commissioner, since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company desires, for the first time, to do business in Oklahoma to require it, among other things, to file an application for a license to expire on the last day of February next after its issue, and, on or before such date, to pay the gross premium tax imposed by law on all premiums, less proper deductions, received by it in Oklahoma from the date of the issuance of its license to and including the 31st day of December next; and when a foreign insurance company holding a license to do business in Oklahoma during any license year desires to do business therein during the ensuing license year, to require it, among other things, (a) to file, on or before the last day of February of the current license year, an application for a license for the ensuing year; (b) to pay the gross premium tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year, as a condition precedent to the issuance of the license for the ensuing year; and (c) to pay, on or before the last day of February of the ensuing license year the gross premium tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year; and since the effective date of such Act the Insurance Commissioner has uniformly interpreted such Act as providing for a license, to expire on the last

[fol. 191] day of February next after its issuance; and in issuing renewal licenses has uniformly construed it as requiring the payment, on or before the last day of February in each year, of the gross premium tax for the right or privilege of entering Oklahoma and doing business therein during the license year expiring on that date.

Under the law licenses issued to foreign insurance companies expire on the last day of February next after the date of their issuance. If the construction and interpretation by the administrative officer and the court of the constitutional and statutory provisions quoted above is permissible, there is no invalidity in the gross premium tax therein provided.

It is well settled that a state may *withhold* from a foreign corporation the privilege of doing business within its borders entirely. It may grant such privilege or authority on such conditions as it may deem fit. Williams *v.* Standard Oil Company of Louisiana, 278 U. S. 235, 73 L. ed. 287; Hanover Fire Insurance Company *v.* Carr, Treasurer, 272 U. S. 494, 71 L. ed. 372. These general rules are subject to a well-settled qualification that a state may not impose conditions which require the surrender of rights guaranteed by the Federal Constitution. The power of a state to exact a gross premium tax from a foreign insurance company for the privilege of doing business within the state is likewise well settled. Philadelphia Fire Association *v.* New York, 119 U. S. 100, 30 L. ed. 342.

It is the contention of plaintiff that because the gross premium tax involved is not payable and could not be computed or collected until the close of the year 1941, it cannot be held as a valid tax for the privilege of doing business [fol. 192] in the state during that year.

It is not essential that a privilege tax be paid before the exercise of the privilege. Payment may precede or follow the exercise of the privilege, depending upon which system the Legislature chooses to adopt. Carpenter, Insurance Commissioner *v.* Peoples Mutual Insurance Company (Calif.), 74 Pac. 2d 508; William A. Slater Mills, Inc. *v.* Gilpatric, State Treasurer, 117 Atl. 806; Pacific Mutual Life Insurance Company *v.* Hobbs, Commissioner of Insurance (Kan.), 103 Pac. 2d 854.

In the latter case it was held:

"1. The statute requiring foreign insurance companies, at the time of making annual statements re-

quired by law, to pay taxes on the gross amount of premiums received by them for business done in the state during the preceding year, imposes taxes, payable at the end of the year, for the privilege of doing business in the state."

3. The tax on gross premiums received by foreign insurance companies for business done in the state is an 'excise tax' in the nature of a franchise or privilege tax on the privilege of doing business, and partakes of the nature of a license tax in the sense that payment thereof is required as a condition precedent to the renewal of certificates of authority of such companies."

In the body of the opinion it is stated:

"The tax is an excise tax. The company was given the privilege of doing business in the state. Upon what basis is the tax to be imposed? Obviously upon the volume of business done during the previous year. On the 1st day of January or within sixty days thereafter, the company is required to make a return showing the business done during the previous year. The tax is on the priviledge of doing business in the state,—the tax is fixed at a percentage of premiums received during the preceding year. The payment of the tax follows the exercise of the privilege. The method selected appears to be both equitable and convenient."

Sections 1 and 2, Artice 19, of the Constitution, together with the statutory provisions above quoted, permit the construction that the payment of a gross premium tax on or before the expiration of the license year for the privi- [fol. 193] lege of doing business in the State during the license year is a condition precedent to the issuance of a license for the ensuing year. This has been the uniform construction and application of the law by the executive department of the State charged with the administration of the law. It was in effect so held by the trial court. See, also, Great Northern Life Insurance Company, a corporation, v. Jess G. Read, Insurance Commissioner for the State of Oklahoma, 136 Fed. 2d 44 (pending on proceedings in error in the Supreme Court of the United States). That the law calls for the payment of the tax for the privilege of doing business in this State is clear by the provisions of Sections 1 and 2, Article 19 of the Constitution. Sec-

tion 1 prohibits the licensing of all foreign insurance companies to do business in this State until they shall have complied with the laws of the State and shall have agreed to pay all taxes and fees as may at any time be imposed by law or Act of the Legislature. Section 2 of Article 19 prescribes one fee a foreign life insurance company is required to pay, namely, $200.00 per annum. The amount of that fee may not be changed except by amendment of the Constitution. The latter part of Section 2 fixes the tax which foreign insurance companies were required to pay until otherwise provided by law, namely, the annual tax of two per centum on all premiums collected in the State after all cancellations are deducted. That was the tax imposed by law referred to in Section 1. That tax was subject to change by the Legislature. It was so changed in 1909 (Section 10478, supra) by allowing deductions for dividends paid to policyholders as well as all cancellations and by adding on annual tax of $3.00 on each local agent. That Act made such taxes payable to the State Insurance Commissioner and provided that the tax should be in lieu of all other taxes or fees of any subdivision [fol. 194] or municipality of the State. The only material change made by the 1941 amendment is to increase the rate of tax from two per centum to four per centum.

It is clear that payment of such tax at the end of the licensing year was intended. The reason is that the amount of such tax is dependent on the amount of premiums collected during the taxing year and could not be determined until the end of such year. The tax imposed is clearly a privilege tax. New York Life Insurance Company v. Board of Commissioners of Oklahoma County, 155 Okla. 247, 9 Pac. 2d 936. It is payable at the end of the year during which the privilege is granted by the State and exercised by the insurance company. This is in accord with the departmental construction of the law for more than thirty years. Such departmental construction does not appear to have been challenged by any foreign insurance company during the thirty-two years from 1909 until the amendment of 1941. This long-continued departmental construction should not be overturned without cogent reasons. Globe Indemnity Company v. Bruce, 81 Fed. 2d 143; City of Tulsa v. Southwestern Bell Telephone Company, 75 Fed. 2d 343; United States v. Jackson, 280 U. S. 183, 74 L. ed.

361; Federal Land Bank v. Warner, 292 U. S. 53, 78 L. ed. 1120.

Plaintiff cites and relies strongly on Hanover Fire Insurance Company v. Carr, 272 U. S. 494, 71 L. ed 372, supra. It relies on the fact that the tax there involved was held to violate the 14th Amendment and deprived the insurance company of equal protection of the law. That case may well be distinguished from the case at bar as to the tax there held to be invalid. The Hanover Fire Insurance Company was an insurance company organized under the laws of the State of New York. It had for a number of years conducted a fire insurance business in South Chicago, [fol. 195] Cook County, Illinois, through agencies maintained there. In 1919, the State of Illinois enacted a statute which provided that each foreign corporation licensed and admitted to do an insurance business in the state should pay an annual state tax for the privilege of doing business in the state equal to two per centum of the gross amount of premiums received by it during the preceding calendar year on contracts covering risks within the state, after certain deductions, and that such tax should be in lieu of all license fees or privilege or occupation taxes levied or assessed by any municipality of the state, but this should not be construed so as to prohibit the levy and collection of any state, county or municipal taxes upon the real and personal property of such corporations. There was no contention as to the validity of that tax. The State of Illinois also had in effect a statute known as the Fire and Marine Insurance Act of 1869, as amended (Cahill's Rev. Stat. 1925, Chapter 73). Section 30 of said Act in part provided:

> "Every agent of any insurance company, incorporated by the authority of any other state or government, shall return to the proper office of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—state, county, town and municipal—that other personal property is subject to at the place where located; * * *".

A general revenue Act of the State of Illinois, adopted in 1898, required personal property to be valued at its fair

cash value and set down in one column headed "Full Value" and one-half thereof to be ascertained and set down in another column headed "Assessed Value." In 1923, and for many years prior thereto, by what was called an equalization, systematically and intentionally carried out, the amount set down in the "Full Value" column was [fol. 196] not more than 60% of the actual fair cash value of personal property returned, and the amount set down in the "Assessed Value" column was not more than 30% of the actual, fair cash value, so that taxes on personal property would be levied and collected on an assessed value of 30% of the full or fair cash value of the property. For a long time and in a long line of decisions the Supreme Court of Illinois had held that the tax imposed by Section 30, supra, on the net receipts of foreign insurance companies was a tax on personal property. Accordingly, such net receipts had been treated as personal property. The law was enforced under that construction for a long time, with full acquiescence by the foreign insurance companies. But in June, 1923, in People ex rel. Chicago v. Barrett, 309 Ill. 53, 139 N. E. 903, the Supreme Court of Illinois held that said tax was an occupation tax and that the value of the net receipts of foreign insurance companies should not be reduced as in the case of personal property. The result was that the tax imposed by Section 30, supra, was more than trebled. It was this tax so increased which was attacked in the Hanover case, supra. It appears that after said decision the taxing authorities of Cook County, Illinois, valued and assessed the net premium receipts at their full value and levied a tax accordingly, and issued a warrant for the collection of the same. To prevent a distraint of its property, the Hanover Company brought an action against the tax collector for an injunction. The trial court denied relief and the Supreme Court affirmed the Superior Court. Hanover Fire Insurance Company v. Carr, 317 Ill. 366. The case was taken by Writ of certiorari to the Supreme Court of the United States. There it was held in effect that the tax under the law as last construed by the Supreme Court of Illinois worked an unlawful discrimination against [fol. 197] the Hanover Fire Insurance Company. It was held that the authority or license granted under the 1919 Act for which the Hanover Company paid the 2% tax on gross premiums received by it, put said company on a level with domestic insurance companies doing a like business; that

compliance with Section 30 of said Act was not a condition precedent to permission to do business in Illinois. The tax under the law as previously construed, however, was in substance upheld. With reference thereto the court said:

> "* * * Under the previous decisions of the supreme court of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the state, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property including their net receipts or what they were invested in. It was this view, doubtless, which led to the acquiescence by the state authorities and the foreign insurance companies in such a construction of s 30 and in the practice under it. * * *"

Final disposition of the Hanover case, as shown in Hanover Fire Insurance Company v. Harding, County Collector, 158 N. E. 849; is that the tax was upheld as upon a debased or decreased valuation of the net receipts in accordance with the former decisions. The 2% gross premium tax levied under the law in Illinois, almost the same as the Oklahoma law as construed by the department and the court below as a privilege tax or license tax, was upheld.

In the case at bar, the State exacts payment on or before the last day of February of each year of a valid privilege tax, based upon gross premiums collected for the privilege of doing business in this State during the license year, expiring on the date upon which the tax was required to be [fol. 198] paid, and also requires a showing of timely payment of such tax as a condition precedent to the issuance of a license for the ensuing year. As we have seen, the date when the payment for the privilege of doing business in the State is required is not material. It may be before or at the end of the license year.

Incidentally, it may be noted that the plaintiff did not protest payment of the tax as a whole. Examination of the

two protests filed, copies of which are attached to the amended petition, show that in the first protest, dated February 26, 1942, only $1,651.31 was protested. That was protested as being tax in excess of 2% of all premiums collected in Oklahoma on insurance policies during the calendar year of 1941. In the second protest, dated March 17, 1942, $2,936.33 was protested as a tax excessive and void because deductions claimed for cancellations were not allowed by the Insurance Commissioner. That made a total tax protested of $4,587.64. The total amount paid and the amount sued for was alleged to be $6,238.94. That leaves $1,631.30 not protested. Evidently plaintiff, at the time it filed its protests, considered the 2% levied by the law under Section 10478, before its amendment, was valid tax. At least it did not protest that part thereof.

From the foregoing authorities we conclude that 36 O. S. 1941, Section 104, does not violate the 14th Amendment, and does not deprive the plaintiff of equal protection of the law.

We next consider the demurrer as applied to the second cause of action. The question is presented by plaintiff in its brief under the third proposition. Thereunder plaintiff contends that the "Cancellations" to be deducted as provided in the Constitution and statutes above referred to necessarily consist of the return of premiums, including [fol. 199] cash surrender values paid to policyholders, according to the terms and provisions of the life insurance contracts. The argument is that these funds are accumulated under the level premium plan by charging, during the early years of the policy, a net premium which is larger than is necessary to pay for the insurance in those years, with a view of accumulating a fund large enough to enable the company to meet the cost of insurance in the later years of life of the insured when the net premium is insufficient to pay for the current cost of protection, and that upon surrender of the policy by the insured, the payment to him of the "cash surrender value" is nothing more than a return of the excess part of the premiums theretofore charged and collected with an assumed rate of interest, and is but a return of money that in reality belongs to the insured. One difficulty with that theory is that the "assumed rate of interest" is not necessarily the actual rate of interest or income derived from the use of such money while in the hands of the insurer.

The defendants contend that the words "after all cancellations are deducted" refer only to the unearned parts of premiums on insurance policies collected in advance for a given term where the policies are canceled prior to the expiration of such term under the provisions of the policy or of the law relating thereto, and which unearned premiums are returned to the policyholder; that when used in connection with a life insurance policy, the words are applicable only in instances where policies have been procured by fraud, mistake, etc., and the policies are canceled and the premium is returned without respect to the length of time the policy has been in existence; that the return of the entire premium collected in such cases is called for because the policy never had any validity and no risk was ever assumed thereunder.

[fol. 206] There is no case cited by plaintiff directly in point. Volunteer State Life Insurance Company v. Larson, State Treasurer (Fla.), 2 So. 2d 386, construed a statute similar to our constitutional and statutory provisions, which directed the State Treasurer in collecting the amount due upon a gross premium tax of 2% to omit or deduct "return premiums and cancellations." Our law directs deduction of "all cancellations and dividends paid to policyholders."

The Supreme Court of Florida, in Volunteer State Life Insurance Company v. Larson, supra, stated in substance, as contended for by plaintiff in the case at bar, that "the legislation is so clear and well fixed that the duty of the court is to follow the plain language implied by it." It was there held that deductions for surrender value of the policies, paid to the policyholders during the year, were required. But State ex rel. Pacific Mutual Life Insurance Company v. Larson, State Treasurer, etc. (Fla.), 12 So. 2d 896, expressly overrules Volunteer State Life Insurance Company v. Larson, supra. In State ex rel. Pacific Mutual Life Insurance Company v. Larson, supra, it is pointed out that the cash surrender values on policies of life insurance are property rights generally created or established by the provisions of the contracts of life insurance. In the opinion it is stated:

> "Various items, according to each contract, may enter into, include, and compose the property right recognized as the 'cash surrender value of a policy.' The payment by the insurance company to the policy-

holder of the 'cash surrender value of a policy' and the surrender thereof by the policyholder to the insurance company is not a 'cancellation' within the terms of the Act, but is simply a performance of the obligations of the contract as originally entered into by the parties. The policy, when cashed and surrendered as between the parties, becomes functus officio. It was not the intention of the Legislature when using the term 'cancellation' to make it embrace or include the 'cash surrender value of a policy of life insurance.'"

[fol. 201] We approve the statements there made. It is clear that the payments of the cash surrender value as provided in the policies are but the fullfilment of the contracts of insurance as written. It is no more a cancellation of the policy within the meaning of the Constitution and statutes than is the full payment on insurance policies at maturity or the payment of the principal amount of the contract upon the death of the insured. In either case the provisions of the policies are performed.

We hold that the payment for cash surrender value as provided for in the policy is not a cancellation within the terms or within the meaning of the Constitution and statutes. There was no error in sustaining the demurrer as to the second cause of action.

Under the second proposition in plaintiff's brief, going to the third cause of action, it is contended that the increase in the tax from 2% to 4% effective April 25, 1941, could in no event operate as to premiums collected by plaintiff prior to April 25, 1941.

As applied to plaintiff's third cause of action, the petition as amended does not challenge the validity of the increase in the rate of tax from 2% to 4% as to premiums collected after April 25, 1941. It goes only to the validity of the increase of the tax as applied to premiums collected in 1941, prior to April 25th. That part of the tax was not specifically protested.

68 O. S. 1941, Section 15.50, under which authority for an action of this nature is given, requires that the notice (protest) to the collecting officer shall show the "grounds of complaint." The Attorney General makes no contention that the notice or protest here involved is insufficient. We therefore treat it as sufficient to raise the question here presented.

The sole question involved is whether increase in rate of [fol. 202] taxes to be paid is legally applicable to premiums collected in 1941 but prior to April 25th, the effective date of the Act raising the rate of the tax. By the language used in the statute as amended, the increased rate is not specifically made retroactive. The general rule is that statutes are to be construed as having a prospective operation unless the purpose and intention of the Legislature to give them retrospective effect is expressly declared or is necessarily implied from the language used. In every case of doubt, the doubt must be resolved against the retrospective effect. Dood et al. v. Keel et al., 29 Okla. 325, 116 Pac. 777; People ex rel. Mutual Trust Company of Westchester County v. Miller, Comptroller, 177 N. Y. 51, 69 N. E. 124; Blodgett v. Holden, 275 U. S. 142, 72 L. ed. 206; Lewellyn v. Frick, 268 U. S. 238, 69 L. ed. 934.

In Good v. Keel, supra, it is said:

> "This general rule has been applied to a great variety of statutes, including the uniform negotiable instruments law, usury laws, statutes levying taxes, relating to defenses to actions on insurance policies, relating to damages for wrongs, providing for rendition of deficiency judgments upon sale of mortgaged premises, limiting the time for the commencement of actions, declaring certain contracts void, regulating parties who may sue for death by wrongful act, or the manner of distribution of the amount recovered, modifying the fellow servant rule, relating to plans for bridges over railroad tracks, relating to mechanics' liens, defining the boundary of a city, etc. * * *"

This being a tax for the privilege of doing business within the State during the year for which the privilege is granted by the State and exercised by the insurance company, as we have held, plaintiff became subject to the increased rate during the license year. But there is nothing in the Act which specifically provides that the increased rate should apply to premiums collected prior to the effective date of the Act increasing the rate. Neither can it be said that such [fol. 203] application is necessarily implied from the language used in the Act. Tested by the rule stated above, the Act must be construed so as to apply the increased rate only to the premiums collected after the effective date of the Act.

The petition alleged the amount of premiums collected in 1941 before April 25th, and alleged the amount of dividends paid to policyholders during that time. Therefore, plaintiff's petition as to the third cause of action stated facts sufficient to constitute a cause of action for the recovery of the amount of taxes, hereinafter set forth, paid by plaintiff in error by reason of the application of the increased rate to the premiums collected prior to the effective date of the act increasing the rate.

The parties have filed herein their joint motion and stipulation whereby they agree that there exists no issue as to the facts set out in the petition and that the amount of the tax involved in said third cause of action is the sum of $847.18, and pray that this court completely determine and adjudicate this action. This court is vested with jurisdiction of the parties and subject matter involved. Further proceedings in the trial court could result in no benefit to any of the parties and would only involve the litigants in more expense and delay and nothing could be gained thereby. The approval of said stipulation is in the furtherance of justice.

The order of the trial court in sustaining the demurrer to the first and second causes of action is affirmed.

The order sustaining the demurrer to the third cause of action and the judgment dismissing the petition are reversed.

The Court, in consideration of the premises, finds and determines that $847.18 of the $6,238.94 sued for by plaintiff in error was illegally collected, as not being due the State of Oklahoma, but that the remainder of said sum, [fols. 204-205] to-wit $5,391.76, was legally collected, as being due the State of Oklahoma.

It is, therefore, ordered, adjudged and decreed by the Court that the first and second causes of action of the petition of plaintiff in error be and the same are hereby dismissed and that the legal amount of taxes due by plaintiff in error to the State of Oklahoma is the said sum of $5,391.76.

It is also ordered, adjudged and decreed by the Court that the said sum of $847.18 so paid is in excess of the legal and correct amount due by plaintiff in error to the State of Oklahoma, and defendants in error are hereby ordered

and directed to pay said excess to plaintiff in error and to take its receipt therefor.

It is further ordered and adjudged that the costs herein be paid by plaintiff in error.

Coneur: Corn, CJ, and Osborn, Bayless, Welch, Hurst, Davidson and Arnold, JJ.

Dissent: Gibson, VCJ, dissents to paragraph 8 of the syllabus and to that part of the opinion of which said paragraph 8 is representative, but concurs in the remainder of said opinion.

[fol. 206] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA TO THE SUPREME COURT OF THE UNITED STATES AND ASSIGNMENT OF ERRORS—Filed December 12, 1944

To the Honorable Chief Justice of the Supreme Court of the State of Oklahoma:

The Lincoln National Life Insurance Company, a corporation, Appellant in the above-entitled cause, respectfully shows by this petition and the assignment of errors hereinafter set forth and the statement as to jurisdiction accompanying this petition, that in the records, proceedings, decision, and final judgment of the Supreme Court of the State of Oklahoma in cause No. 31338, styled "The [fol. 207] Lincoln National Life Insurance Company, a corporation, Plaintiff in Error, vs Jess G. Read, the Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error," the said Court being the highest court of the State of Oklahoma in which a decision could be had in said suit, and the decision and judgment therein being final, manifest error has occured, greatly to the damage of this petitioner.

That as appears from the records, proceedings, decision, and judgment in said cause, there was drawn in question the validity of statutes of the State of Oklahoma on the ground of their being repugnant to the Constitution or

laws of the United States and the decision and final judgment in said cause is in favor of their validity, the said statutes of the State of Oklahoma being Section 1, Chapter 1a, Title 36, page 121, Session Laws of Oklahoma, 1941 (36 Oklahoma Statutes 1941, section 104), amendatory of Section 10478, Oklahoma Statutes 931; Sections 1 and 2, Article XIX of the Constitution of the State of Oklahoma.

Petitioner avers that on the 27th day of March, 1942, it filed its petition in the District Court of Oklahoma County, Oklahoma, for the recovery of certain taxes levied under the above mentioned 1941 statutes of Oklahoma, which taxes it had paid involuntarily and under protest. Petitioner showed under the first cause of action alleged in its said petition and its amended petitions filed in said cause that it is a life insurance company organized under [fol. 208] the laws of Indiana, and for many years duly admitted to do business in Oklahoma, and had established therein at great expense a valuable life insurance business; that the aforementioned statutes of Oklahoma imposed exclusively upon foreign insurance companies a tax upon gross premiums collected by such companies in Oklahoma; that the rate of such tax was increased from 2% to 4% by the aforementioned 1941 statute; that said gross premium tax laws are not regulatory but revenue-producing measures and impose drastic, heavy, and coercive penalties against foreign insurance companies failing to comply therewith; that similar domestic insurance companies do not share in such tax burdens; that said statutes impose upon petitioner and other foreign insurance companies within the jurisdiction of the State of Oklahoma unequal, arbitrary, and discriminatory tax burdens and deny to them the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

Further allegations and claims not material to an appeal to the United States Supreme Court were included in said petition and amended petitions of petitioner and carried forward under the second and third causes of action alleged in the second amended petition and were alleged only in the event petitioner failed to sustain its said first cause of action.

Petitioner avers that on the 11th day of September, 1942, the said District Court of Oklahoma County, Oklahoma, rendered its judgment, sustaining the demurrer of Appellees to the second amended petition of petitioner, and dis-

missed said cause, and wherein it ruled that neither Section 2, Article XIX of the Constitution of Oklahoma; Section [fol. 209] 10478; Oklahoma Statutes 1931; Chapter 1a, Title 36, page 121, Oklahoma Session Laws, 1941, nor the construction or application thereof by the Insurance Commissioner of Oklahoma violate the Fourteenth Amendment of the Constitution of the United States.

Petitioner avers that an appeal from said judgment to the Supreme Court of the State of Oklahoma was duly perfected and the final decision of said Court was made, rendered, filed, and entered on the 21st day of November, 1944. Thereafter no petition for rehearing has been filed in said cause and the time allowed by the rules of said Court for the filing of a petition for rehearing expired on the 6th day of December, 1944.

Petitioner further avers that the Supreme Court of the State of Oklahoma in the decision and final judgment above mentioned affirmed the aforesaid judgment of the trial court, dismissing the first cause of action contained in said petitions of petitioner, and ruled that the imposition of gross premium tax on foreign insurance companies for the privilege of doing business within the State, as provided by Sections 1 and 2 of Article XIX of the Constitution of the State of Oklahoma and Section 10478, Oklahoma Statutes 1931, and 36 Oklahoma Statutes 1941, section 104, does not violate the Fourteenth Amendment of the Federal Constitution, though no like tax is exacted from domestic insurance companies, thus committing the manifest error herein, complained of.

[fol. 210] ASSIGNMENT OF ERRORS

Petitioner assigns the following errors in the record, proceedings, decision, and final judgment in said cause, to-wit:

(1) The Supreme Court of the State of Oklahoma erred in adjudicating and deciding that Section 1, Chapter 1a, Title 36, page 121, Session Laws of Oklahoma, 1941, (36 Okla. Stat. 1941, sec. 104), approved and in force April 25th, 1941 (hereinafter referred to as the 1941 statute), was and is a good and valid enactment, and is not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) The Supreme Court of the State of Oklahoma erred in denying the claim of petitioner that said 1941 statute was repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides:

> "* * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

in that petitioner, being a corporation organized under the insurance laws of the State of Indiana, and having complied with the conditions precedent to admission into the State of Oklahoma, including the payment of an entrance fee, and having secured the license, permission, and authority of the State of Oklahoma to transact said business of insurance therein, was subjected by said 1941 statute to an arbitrary and discriminatory 4% tax on gross premiums collected in Oklahoma, while domestic insurance companies of the State of Oklahoma doing identically the same kind of business of insurance as petitioner, were and are not subject to a tax on gross premiums collected by such domestic companies in Oklahoma, or any other similar tax. [fol. 211] (3) The Supreme Court of the State of Oklahoma erred in adjudicating and deciding that said 1941 statute, as construed and applied by appellee, the Insurance Commissioner of the State of Oklahoma, and by the trial court, in levying against petitioner a 4% tax on its gross premiums collected in Oklahoma during the twelve months next preceding January 1st, 1942, is not repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(4) The Supreme Court of the State of Oklahoma erred in denying the claim of petitioner that the provisions of Sections 1 and 2, Article XIX of the Constitution of Oklahoma, and said 1941 statute, as construed and applied by the Insurance Commissioner of Oklahoma, discriminate against petitioner and in favor of domestic life insurance companies, and deprives petitioner of the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(5) The Supreme Court of the State of Oklahoma erred in adjudging and decreeing that by the provisions of Section 1, Article XIX of the Constitution of Oklahoma,

petitioner agreed, as a condition of its admission and permission to do business in the State of Oklahoma, to pay the 4% gross premium tax imposed by said 1941 statute. By reason whereof Section 1, Article XIX of the Constitution of Oklahoma, as so construed and applied by the Supreme Court of Oklahoma, exacts as a condition of a foreign insurance company engaging in business within Oklahoma that it waive its rights under the Federal Con-
[fol. 212] stitution and submit to arbitrary and discriminatory taxation, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(6) The Supreme Court of the State of Oklahoma erred in adjudging and decreeing that the tax exacted from petitioner by said 1941 statute is a valid privilege tax, and does not deny petitioner the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, despite the fact that according to said Court's construction of said statute, the payment of said tax is based on business transacted in the State of Oklahoma and is exacted at the end of the license year for the privilege of doing business in the State during the license year ending at the time of such payment, and domestic companies do not share the burden of said tax.

(7) The Supreme Court of the State of Oklahoma erred in denying the claim of petitioner that an arbitrary and discriminatory privilege tax, which is imposed exclusively on foreign insurance companies doing business in the State of Oklahoma, and which is made to apply on the basis of business transacted by such companies in said State after their permissive entry into said State, as provided by said 1941 statute, denies to petitioner and other foreign insurance companies within the jurisdiction of said State the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 213] (8) The Supreme Court of the State of Oklahoma by its final judgment in this cause held and adjudged that the 4% gross premium tax imposed by said 1941 statute is exacted at the end of the license year for the privilege of doing business in the State of Oklahoma during the license year expiring on the date upon which the tax was required to be paid, and said statute requires a showing

of timely payment of such tax as a condition precedent to the issuance of a license for the ensuing year. By reason whereof, said 1941 statute as so construed and applied by the Supreme Court of Oklahoma makes past compliance therewith and the payment of the arbitrary, unequal, and discriminatory tax imposed thereby a condition precedent to a renewal of the annual license required of foreign insurance companies, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(9) The Supreme Court of the State of Oklahoma erred in denying the claim of petitioner that the illegal tax imposed by said 1941 statute, and which becomes due at the end of each license year, cannot be transformed into a valid license fee and cannot be exacted as a valid condition precedent to the issuance of the renewal license for the ensuing license year, and thereby circumvent the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(10) The Supreme Court of the State of Oklahoma erred in adjudging and decreeing that the decision of the Supreme Court of the United States in *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494, 71 L. ed. 372, is distinguishable from [fol. 214] the cause and that therefore said 1941 statute does not deny petitioner the equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(11) The Supreme Court of the State of Oklahoma erred in affirming the judgment of the trial court in sustaining appellees' demurrer to the first cause of action contained in the petition of petitioner; and erred in dismissing the first cause of action of the petitioner of petitioner, and in not granting the relief in said petition prayed for; which said actions, rulings, and adjudication are in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States and deny to petitioner the equal protection of the laws thereby guaranteed to it.

PRAYER

Wherefore, petitioner prays for the allowance of an appeal to the Supreme Court of the United States from the said judgment of the Supreme Court of the State of Oklahoma, and for such other and further process and pro-

ceedings as will enable petitioner to obtain a review of the case and a correction of said errors by the said Supreme Court of the United States, and also prays that an order be made fixing the amount of the security which petitioner as appellant shall give and furnish upon appeal; and that upon the giving of said security, all further proceedings in the Supreme Court of the State of Oklahoma be suspended and stayed until the determination of said appeal by [fols. 215-264] the Supreme Court of the United States; and that a transcript of the record, proceedings, and papers in this cause, duly authenticated by the clerk of the Supreme Court of the State of Oklahoma, may be sent to the Supreme Court of the United States.

And petitioner further prays that by reason of such errors, or either of them, the said judgment and decision of the Supreme Court of the State of Oklahoma in this cause be reversed, and a judgment rendered in favor of petitioner.

Russell V. Johnson, Charles E. France, Attorneys for Petitioner and Proposed Appellant.

[fol. 265] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed December 12, 1944

The Appellant in the above-entitled suit having presented its petition for appeal on the 12th day of December, 1944, and prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered by the Supreme Court of the State of Oklahoma on the 21st day of November, 1944, in the case of The Lincoln National Life Insurance Company, a corporation, against Jess G. Read, the Insurance Commissioner of the [fol. 266] State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, numbered 31338, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided, it is now here

Ordered, that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Oklahoma in the above-entitled cause as prayed in said petition. And it is further

Ordered, that the Clerk of the Supreme Court of the State of Oklahoma shall prepare and certify a transcript of the record, proceedings, and judgment in this cause, and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within forty (40) days from the date hereof. And it is further

Ordered, that said Appellant shall give good and sufficient security in the sum of One Thousand ($1000.00) that said Appellant shall prosecute said appeal to effect, and if said Appellant fail to make its plea good, it shall answer all damages and costs.

The Said Appellant now presenting a bond in the sum of One Thousand ($1000.00) Dollars, with *Central Surety and Insurance Corporation, a corporation,* as surety, it is [fols. 267-268] Ordered, that the same be, and is hereby approved. The appeal shall operate as a supersedeas and the mandate and all other proceedings in the Supreme Court of the State of Oklahoma in said cause be, and they are hereby stayed pending said appeal.

Dated the 12 day of Dec., 1944.

N. S. Corn, Chief Justice of the Supreme Court of the State of Oklahoma.

[fols. 269-274] Bond on appeal for $1,000.00—approved and filed Dec. 12, 1944, omitted in printing.

[fols. 275-277] Citation in usual form showing service on Randell S. Cobb, filed December 12, 1944, omitted in printing.

[fol. 278] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL—Filed December 13, 1944

To the Clerk of the Supreme Court of the State of Oklahoma:

You are hereby directed to incorporate in the transcript of the record in cause No. 31338, styled "The Lincoln National Life Insurance Company, a corporation, Plaintiff in Error, vs. Jess G. Read, the Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error," in the Supreme Court of the State of Oklahoma, to be prepared and transmitted to the Supreme Court of the United States pursuant to the order of December 12th, 1944, allowing appeal herein, the portions of such record indicated as follows:

(1) Case-made from the District Court of Oklahoma County, State of Oklahoma, and certificates thereto attached.

(2) Petition in error.

[fol. 279] (3) Certificate of appeal.

(4) That portion of the brief of plaintiff in error filed July 12th, 1943, to-wit:

(a) The first paragraph following "Statement of the Case," appearing on page one of said brief.

(b) Paragraph numbered 3 appearing on pages 17 and 18 of said brief.

(5) That portion of the brief of defendants in error August 16th, 1943, appearing on page 2, thereof.

(6) Journal entry showing case orally argued and submitted, entered February 8th, 1944.

(7) Journal entry of opinion filed April 18th, 1944.

(8) Journal entry of order correcting opinion filed April 29th, 1944.

(9) Journal entry of order staying mandate filed May 1st, 1944.

(10) Motion for extension of time to file petition for rehearing filed May 1st, 1944.

(11) Journal entry of order entered May 2d, 1944, granting extension of time to file petition for rehearing.

(12) Petition for rehearing and that portion of the brief in support thereof designated as "I", all of which appears on pages 1 to 11 thereof, filed May 18th, 1944.

(13) Journal entry of order denying petition for rehearing entered September 12th, 1944.

(14) Journal entry of order staying mandate entered September 18th, 1944.

(15) Joint motion and stipulation filed November 14th, 1944.

[fol. 280] (16) Journal entry of order entered November 20th, 1944, withdrawing opinion of April 18th, 1944.

(17) Journal entry of opinion filed November 21st, 1944.

(18) Journal entry of order staying mandate entered November 27th, 1944.

(19) Petition for appeal from the Supreme Court of the State of Oklahoma to the Supreme Court of the United States, and assignment of errors, filed December 12th, 1944.

(20) Statement as to jurisdiction on appeal and exhibits attached thereto, filed December 12th, 1944.

(21) Journal entry of order allowing appeal filed December 12th, 1944.

(22) Bond and approval thereof filed December 12th, 1944.

(23) Journal entry of citation and acknowledgment of service filed December 12th, 1944.

(24) Proof of service and acknowledgment of service filed December 12th, 1944.

(25) Praecipe for transcript of record on appeal and acknowledgment of service.

Dated the 13th day of December, 1944.

Russell V. Johnson, Attorney for Appellant The Lincoln National Life Insurance Company.

Service of the above and foregoing praecipe and receipt of a true copy thereof is acknowledged this 13th day of December, 1944.

Fred Hansen, First Assistant Attorney General, Attorney for Appellees; Jess G. Read, the Insurance Com'r of the State of Oklahoma; and A. S. J. Shaw, State Treasurer of the State of Oklahoma.

[fol. 281] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 282] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED, WITH PROOF OF SERVICE —Filed January 11, 1945

Appellant hereby states that it intends to rely upon the following points:

I

Section 1, Chapter 1a, Title 36, page 121, Session Laws of Oklahoma 1941 (Tit. 36, Okla. Stat. 1941, sec. 104), approved and in force April 25th, 1941, Section 10478, Okla. Stat. 1931 (substantially the same as said 1941 statute except rate of tax is 2% instead of 4%), and Section 7, Article XIX of the Constitution of Oklahoma, and each of them, are unconstitutional and void, in that said statutes deny to Appellant the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

II

The tax laws of the State of Oklahoma set forth in Point I hereof, and each of them, as construed and applied by the Insurance Commissioner, the trial court, and the Supreme Court of the State of Oklahoma, impose a discriminatory, unequal, and unjust tax upon the business of foreign insurance companies within the jurisdiction of the State of Oklahoma, and deny to Appellant the equal protection of the laws, and are repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

[fol. 283]

III

Section 1, Article XIX of the Constitution of the State of Oklahoma, as construed and applied by the Supreme Court of the State of Oklahoma, exacts as a condition of Appellant's engaging in business within the State of Oklahoma that it waive its rights under the Federal Constitu-

tion and submit to arbitrary, unequal, and discriminatory taxation, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

IV

The tax laws of the State of Oklahoma set forth in Point I hereof, and each of them, are unconstitutional and void, in that said laws directly affect, burden, and impede commerce between Oklahoma and other States, in violation of Section 8, Article I of the Constitution of the United States.

V

The tax laws of the State of Oklahoma set forth in Point I hereof, and each of them, as construed and applied by the Insurance Commissioner, the trial court, and the Supreme Court of said State, are unconstitutional and void, in that said laws directly affect, burden, and impede commerce between Oklahoma and other States, in violation of Section 8, Article I of the Constitution of the United States.

PARTS OF RECORD TO BE PRINTED

Appellant hereby makes reference to the transcript of the record filed herein and designates the parts thereof which it deems necessary for the consideration of the foregoing points, as follows:

(1) Petition and exhibits attached thereto. Pages 10 to 32, inclusive.

(2) Summons and return. Pages 35 to 37, inclusive.

(3) Amended petition. Pages 42 and 55, inclusive. Omit exhibits on pages 56 to 64, inclusive, but show that the ex-
[fol. 284] hibits attached to the amended petition are duplicates of the exhibits attached to the original petition.

(4) Second amended petition, the court order endorsed thereon. Pages 68 to 82, inclusive. Omit exhibits on pages 83 to 90, inclusive, but show that the exhibits attached to the second amended petition are duplicates of the exhibits attached to the original petition.

(5) Demurrer. Pages 92 to 93, inclusive.

(6) Journal entry. Pages 96 to 102, inclusive.

(7) Order for revivor. Pages 118 to 120, inclusive.

(8) Petition in error in the Supreme Court of Oklahoma. Pages 1 to 5, inclusive.

(9) Extracts from brief of plaintiff in error. Pages 129 to 130, inclusive.

(10) Extracts from brief of defendants in error. Pages 131 to 132, inclusive.

(11) The last three paragraphs of the journal entry of opinion filed April 18th, 1944, on page 158. Show that the remainder of said opinion is duplicated by that part of the opinion filed November 21st, 1944, appearing on page 182 and continuing to the end of the third line on page 203.

(12) Petition for rehearing. Pages 166 to 168, inclusive.

(13) Journal entry—petition for rehearing denied. Page 177.

(14) Joint motion and stipulation. Pages 179 to 180, inclusive.

(15) Journal entry—order withdrawing opinion. Page 181.

(16) Journal entry—opinion filed November 21st, 1944. Pages 182 to 204, inclusive.

(17) Petition for appeal and assignment of errors. Pages 206 to 215, inclusive. The statement as to jurisdiction on appeal and exhibits attached thereto, appearing on pages [fol. 285] 216 to 264, inclusive, are required by Rule 12, paragraph 5, to be printed when the case is docketed.

(18) Order allowing appeal. Pages 265 to 267, inclusive.

(19) Bond. Pages 268 to 269, inclusive.

(20) Citation and acknowledgment of service. Pages 274 to 275, inclusive.

(21) Proof of service and acknowledgment of service. Pages 276 and 277, inclusive.

(22) Praecipe for transcript of record on appeal and acknowledgment of service. Pages 278 to 280, inclusive.

(23) Certificate of Clerk of Supreme Court of Oklahoma. Page 281.

Russell V. Johnson, Charles E. France, 1706 First National Building, Oklahoma City 2, Oklahoma, Attorneys for Appellant.

A copy of the above and foregoing is acknowledge this 8th day of January, 1945.

Randell S. Cobb, Attorney General of the State of Oklahoma. Fred Hansen, First Assistant Attorney General; State Capitol Building, Oklahoma City 5, Oklahoma, Attorneys for Appellees.

[fol. 285a] [File endorsement omitted.]

[fol. 286] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—February 12, 1945.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 49,286 Oklahoma, Supreme Court. Term No. 833. The Lincoln National Life Insurance Company, Appellant, vs. Jess G. Read, Insurance Commissioner of the State of Oklahoma, et al. Filed January 11, 1945. Term No. 833 O. T. 1944.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 833

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,

Appellant,

vs.

JESS G. READ, INSURANCE COMMISSIONER OF THE STATE OF OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

STATEMENT AS TO JURISDICTION

RUSSELL V. JOHNSON,
CHARLES E. FRANCE,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 833

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, A CORPORATION,

Appellant,

vs.

JESS G. READ, THE INSURANCE COMMISSIONER OF THE STATE OF OKLAHOMA; AND A. S. J. SHAW, STATE TREASURER OF THE STATE OF OKLAHOMA,

Appellees

STATEMENT AS TO JURISDICTION ON APPEAL

Comes now the Appellant, The Lincoln National Life Insurance Company, and upon the presentation of its petition for the allowance of an appeal to this Court, respectfully presents this statement disclosing the basis upon which it contends that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

(A) Statutory Provision Relied On for Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States in this matter is Section 237(a) of the Judicial Code (28 U. S. C. A., sec. 344), as amended by the Act of February 13, 1925 (Ch. 229, 43 Stat. 936, 937; 28 U. S. C. A., sec. 344). Act of Janu-

ary 31, 1928; Ch. 14, 45 Stat. 54, as amended by the Act of April 26, 1928, Ch. 440, 45 Stat. 466 (28 U. S. C. A., secs. 861a, 861b), and more particularly the language of said statutory provision which reads as follows:

"A final judgment • • • in any suit in the highest court of a State in which a decision in the suit——

(B) State Statute Involved in Case

The statutes of the State of Oklahoma, the validity of which is involved are:

Title 36, Oklahoma Statutes 1941, sec. 104, page 1229; Oklahoma Session Laws 1941, page 121, Title 36, Ch. 1a, sec. 1, which reads as follows:

"That Section 10478, Oklahoma Statutes of 1931, be and is hereby amended to read as follows:

"Every foreign insurance company, copartnership, association, inter-insurance exchange or individual who is a nonresident of the State of Oklahoma, doing business in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, which tax, in addition to an annual tax of three dollars ($3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma

Statutes, 1931, shall be in lieu of all other taxes or fees, and the taxes and fees of any sub-division or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars ($500.00); and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State."

Section 10478, Oklahoma Statutes 1931, is substantially the same except the rate of the tax therein was 2%.

Section 1, Article XIX of the Constitution of Oklahoma, which reads as follows:

"No foreign insurance company shall be granted a license or permitted to do business in this State until it * * * shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license."

(C) Dates of Judgment on Appeal

The judgment sought to be reviewed is the judgment delivered by the Supreme Court of Oklahoma in its case number 31338, entitled "The Lincoln National Life Insurance Company, a corporation, Plaintiff in Error, vs. Jess G. Read, the Insurance Commissioner of the State of Oklahoma, and A. S. J. Shaw, State Treasurer of the State of Oklahoma, Defendants in Error," filed and entered on November 21st, 1944, which became final on the 6th day of December, 1944, no petition for rehearing having been filed and the fifteen-day period for the filing of a petition for

rehearing, as provided by Rule 28 of the Supreme Court of Oklahoma, having expired.

The application for appeal is presented herewith on the 12th day of December, 1944.

Nature of the Case

In this action, Appellant, an Indiana corporation admitted to do business in Oklahoma, complains of the imposition upon it and upon all other insurance corporations foreign to Oklahoma, of an annual tax of 4% on all premiums (less statutory deductions) collected in the State of Oklahoma by such companies. The basis for its complaint is that neither this tax nor any comparable tax is levied against Oklahoma insurance corporations, thereby creating a burdensome and discriminatory tax load against foreign insurance corporations and denying to them the equal protection of the law in Oklahoma, as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

The legal question involved is whether this 4% exaction is sustainable as an admission fee (a condition precedent to entering the State to do business), or whether it is a tax which must not be discriminatory as against any person within the jurisdiction of the State of Oklahoma. Appellant contends that it is a discriminatory tax, and that therefore the statute levying it is invalid because it is in conflict with the aforesaid Fourteenth Amendment.

The statute was first passed in 1909 and carried forward in said Section 10478, Oklahoma Statutes 1931, but prior to the said Act of 1941 levied a tax at the rate of 2%. In 1941 the Act was amended to increase the rate of the tax to 4%.

This action was commenced in the District Court of Oklahoma County, Oklahoma, on March 27th, 1942, to contest the first collection of the 4% tax, and in Exhibit "A" at-

tached to and made a part of Appellant's (plaintiff's) petition filed on that date it alleged in part:

> "That said tax paid under protest * * * is unconstitutional, illegal, excessive and void for the reason and upon the grounds * * * that said Act is a revenue measure, and the taxes sought to be imposed thereby are sought to be imposed exclusively upon protestant and other foreign insurance companies doing business in the State of Oklahoma, and not upon domestic insurance companies doing business within the State of Oklahoma; that such Act attempts to levy an arbitrary and discriminatory tax upon protestant after it was duly admitted to the State of Oklahoma and while it was and is a quasi citizen thereof and a person within its jurisdiction entitled to the equal protection of the laws; that by reason of the foregoing and other substantial grounds, said legislative acts purporting to assess said taxes, and the acts of said Insurance Commissioner in demanding, receiving and collecting said taxes are each in contravention of the Constitution and laws of the United States of America, in that the same * * * constitute and are a denial to the undersigned of the equal protestion of the laws, as prohibited by the Fourteenth Amendment to the Constitution of the United States of America * * *; that in paying said tax under protest, the undersigned relies upon and expressly invokes the protection of all the applicable provisions of the Constitution and laws of the State of Oklahoma and the Constitution and laws of the United States of America, including * * * the Fourteenth Amendment to the Constitution of the United States of America, * * * prohibiting the denial to any person of the equal protection of the laws."

The Appellees thereupon, on April 27th, 1942, filed their demurrer, in which they alleged, among other things, that the petition failed to state facts sufficient to constitute a cause of action against them.

Thereafter, on May 19th, 1942, by leave of Court Appellant filed its amended petition, carrying forward the allegations contained in its original petition, and wherein it elaborated extensively upon the facts which it asserted sustained the allegations made in Exhibit "A" to its original petition. Appellees refiled their same demurrer against the amended petition.

On August 27th, 1942, by leave of Court Appellant filed its second amended petition, carrying forward the same allegations contained in its original and amended petitions, and wherein Appellant elaborated more extensively upon the facts. In said second amended petition Appellant further alleged that the tax therein mentioned was paid involuntarily and to avoid the statutory forfeitures, penalties, revocation of its agents' certificates of authority, and its debarment from transacting its business in Oklahoma, and to prevent deprivation and loss of its rights, interests, investments, and property within the State of Oklahoma; that in October, 1919, Appellant qualified as a foreign life insurance company and was admitted to do business in said state and has since that date continued to do business therein, having paid the annual license fee of $200.00 per year, and has paid all taxes and fees lawfully assessed by said State, and has complied with all requirements of the laws of said State; that Appellant has built up good will and has established a successful and valuable life insurance business in said State, a substantial portion of which is personal to Appellant and is without use or value to others and not subject to lease or sale to others; that domestic insurance companies in Oklahoma transact the same and identical type of business in Oklahoma as Appellant and that there is no reasonable basis upon which domestic companies can be classified as separate and distinct from foreign insurance companies in Oklahoma; that said 1941 statute is a revenue-producing measure and is not a regulatory measure

enacted under the police power of Oklahoma; that Section 1, Article XIX of the Constitution of the State of Oklahoma violates the Constitution of the United States in that it attempts to exact as a condition on corporations engaging in business in said State that such foreign insurance companies' rights secured under the Constitution of the United States be waived or ignored.

Appellees refiled their same demurrer against the second amended petition.

On September 8th, 1942, Appellees' demurrer to Appellant's second amended petition was presented to the Court and taken under advisement. On September 11th, the demurrer was passed upon. The journal entry of said order, filed September 14th, 1942, said in regard to the question involved here:

> "• • • the Court being fully advised in the premises, and in consideration thereof, finds that neither Section 2, Article 19 of the Constitution of Oklahoma, Section 10478, Oklahoma Statutes 1931, or House Bill No. 353 of the 18th Oklahoma Legislature (Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941), nor the construction or application thereof by the Insurance Commissioner of Oklahoma referred to in plaintiff's second amended petition, violate the 14th Amendment of the Constitution of the United States. • • •"

The findings of the trial court regarding the operation of said statute and the uniform administrative practice thereunder are contained in the copy of the judgment marked "Exhibit 1," hereto attached and made a part hereof.

The demurrer was thereupon sustained for the reason that Appellant's petition was held not to have stated a cause of action, and the case was dismissed. A true and complete copy of the journal entry of said judgment, marked "Exhibit 1," is hereto attached and made a part

hereof. Notice of appeal from that judgment was given, and the controversy was taken to the Supreme Court of the State of Oklahoma, all the questions raised as described above being preserved in and made the basis of the appeal.

In Appellant's petition in error to the Supreme Court of the State of Oklahoma, it alleged, complaining of the Honorable trial court:

> "6. Said Court erred in finding that Section 2, Article 19, of the Constitution of Oklahoma does not violate the Fourteenth Amendment of the Constitution of the United States.
>
> "7. Said Court erred in finding that Section 10478, Oklahoma Statutes of 1931, does not violate the Fourteenth Amendment of the United States.
>
> "9. Said Court erred in finding that House Bill No. 353 of the Eighteenth Oklahoma Legislature (Chap. 1a, Title 36, p. 121, Oklahoma Session Laws, 1941) does not violate the Fourteenth Amendment of the Constitution of the United States.
>
> "11. Said Court erred in finding that the construction or application of Section 2, Article 19, Constitution of Oklahoma; Section 10478, Oklahoma Statutes 1931; or House Bill No. 353 of the Eighteenth Oklahoma Legislature (Chap. 1a, Tit. 36, p. 121, Oklahoma Session Laws, 1941) by the Insurance Commissioner of Oklahoma, referred to in plaintiff's second amended petition, does not violate the Fourteenth Amendment of the Constitution of the United States."

On pages 17-18 of the brief of plaintiff in error (Appellant here) in said cause No. 31338 in the Supreme Court of the State of Oklahoma the following appears:

> "The laws of Oklahoma imposing a tax of 4% upon premiums collected by foreign insurance companies discriminate between foreign and domestic insurance corporations to the advantage of the latter and to the prejudice of the former. Although it is considered as

admitted upon the demurrer that the 4% tax is a heavy discrimination against foreign insurance companies, we believe it not amiss to add for the information of the Court a statement to which we understand the defendants will readily agree, viz.: That the tax of 4% of all premiums, less proper deductions, collected by the plaintiff insurance company in the State of Oklahoma, is not collected on like premiums of competing domestic insurance companies, and the only tax collected from said latter companies not collected from the plaintiff insurance company is a state income tax amounting to approximately one-twentieth of said 4% tax."

On page 2 of the brief of defendants in error (Appellees here) in said cause No. 31338 in the Supreme Court of the State of Oklahoma the following appears:

"* * * in order that the Court may not misunderstand defendants' conception of the discriminatory character of the premium tax involved here, both before and after it was increased in 1941 from two per cent to four per cent, we desire to state that we fully agree with plaintiff's statements on page 18 of its brief, (same being in relation to matters of common knowledge in which the Court may take judician notice) that

"'the tax of 4% of all premiums, less proper deductions, collected by the plaintiff insurance company in the State of Oklahoma, is not collected on like premiums of competing domestic insurance companies, and the only tax collected from said latter companies not collected from the plaintiff insurance company is a state income tax amount to approximately one-twentieth of said 4% tax (or one-tenth of said 2% tax.)'

and

"'the expenses of the State Insurance Department since statehood until December 31st, 1941, have been approximately 3.55% of the amount collected from the former 2% premium tax and other receipts, and since

said latter date said expenses have been approximately 2% of the amount collected from the present 4% premium tax and other receipts.' "

In the aforementioned judgment of the Supreme Court of the State of Oklahoma said Court held:

"From the foregoing authorities we conclude that 36 O. S. 1941 § 104 does not violate the 14th Amendment, and does not deprive the plaintiff of equal protection of the law." (Quotation from opinion.)

"A state may, subject to paramount authority of the Federal Constitution, withhold from foreign corporations the privilege of doing business within the State, or grant such privilege on such conditions as the state may deem fit, provided such conditions do not require the surrender of rights guaranteed by the Federal Constitution.

"A state may exact a gross premium tax from foreign insurance companies for the privilege of doing business within the state,

"It is not an essential of a privilege tax exacted by a state from a foreign corporation for the privilege of doing business within the state that it be paid before the exercise of the privilege. Payment may precede or follow the exercise of the privilege.

"The long-continued construction of a statute by department of government charged with its execution is entitled to great weight and should not be overturned without cogent reasons. Great Northern Life Insurance Company v. Read, Insurance Commissioner of Oklahoma, 136 Fed. 2d 44.

"Payment of gross premium tax by foreign insurance companies on or before the expiration of the license year is exacted for the privilege of doing business within the State of Oklahoma during that license year and a showing that such tax has been paid is a condition precedent for the issuance of a license for the ensuing year.

"It was within the power of the State of Oklahoma to change the requirements for the privilege of a foreign insurance company to do business within the state by increasing the rate of gross premium tax exacted for such privilege during the license year as to premiums collected after the effective date of the act increasing the tax.

"Imposition of gross premium tax on foreign insurance companies for the privilege of doing business within the state as provided by sections 1 and 2 of article 19 of the Constitution of the State of Oklahoma and section 10478, O. S. 1931, and 36 O. S. 1941, § 104, does not violate the 14th Amendment of the Federal Constitution, though no like tax is exacted from domestic insurance companies."

In said judgment the Supreme Court of Oklahoma affirmed the order of the trial court in sustaining the demurrer to the first and second causes of action contained in the second amended petition of Appellant, reversed the order of the trial court in sustaining the demurrer to the third cause of action contained in said petition, reversed the judgment of the trial court dismissing said petition, dismissed said first and second causes of action, rendered judgment for Appellant upon its third cause of action, and assessed the costs of the action against Appellant.

The findings of the Supreme Court of the State of Oklahoma regarding the operation of said statutes in question, the uniform administrative practice thereunder, the manner in which the Court attempts to distinguish the case of *Hanover Fire Insurance Company* v. *Carr*, 272 U. S. 494, 71 L. Ed. 372, and the grounds of its said judgment and decree are contained in the copy of the judgment of said Court marked "Exhibit 2," hereto attached and made a part hereof. The Supreme Court of the State of Oklahoma is the highest court of said state in which a decision of this suit can be had, and its judgment aforesaid is final.

We respectfully submit that this case presents a clear instance of a controversy where is drawn in question the validity of a statute of a state on the ground of its being repugnant to the Constitution of the United States, and that this appeal is squarely within Section 237(a) of the Judicial Code (28 U. S. C. A. 344). See *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239, 42 Sup. Ct. Rep. 106; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U. S. 1, 64 L. Ed. 421; *Western Turf Association* v. *Greenberg*, 204 U. S. 359, 27 Sup. Ct. Rep. 384, 51 L. Ed. 520.

Substantiality of the Federal Question

We respectfully submit also that there can be no doubt as to the substantiality of the Federal question. Primarily, the decision in this case will depend upon the interpretation by this Honorable Court of the doctrines enunciated in the case of *Hanover Fire Insurance Co.* v. *Carr, Treasurer*, 272 U. S. 494, 47 Sup. Ct. Rep. 179, 71 L. Ed. 372.

There, as here, the State sought to impose upon foreign insurance companies a tax alleged to be discriminatory. Justification of the tax was attempted on the ground (among others) that it was a *condition precedent* to admission to do business in the future within the State, therefore not being truly a tax but an admission fee not required to be fair or equal.

Both the tax there and the tax here have been held to be privilege taxes, but that characterization is absolutely immaterial to this issue. As we understand the decision in *Hanover* v. *Carr, supra*, the only question (defendants having by their demurrer herein admitted said tax is discriminatory) is whether it is a tax or an admission fee. And to be an admission fee, the levy itself must be directly and

primarily a condition precedent to admission to do business within the State for a future period.

Witness Mr. Chief Justice Taft, at 272 U. S. 511:

> "In this class of cases, therefore, the question of the application of the equal protection clause turns on the stage at which the foreign corporation is put on a level with domestic corporations in engaging in business within the state. To leave the determination of such a question finally to a state court would be to deprive this court of its independent judgment in determining whether a Federal constitutional limitation has been infringed. While we may not question the meaning of the tax law as interpreted by the state court in the manner and effect in which it is to be enforced, we must re-examine the question passed upon the the state court as to whether the law complained of is a part of the condition upon which admission to do business of the state is permitted and is merely a regulating license by the state to protect the state and its citizens in dealing with such corporation, or whether it is a tax law for the purpose of securing contributions to the revenue of the state as they are made by other taxpayers of the state."

It may be that the axis of this problem will be brought into focus more clearly by examining the manner in which the Supreme Court of Oklahoma committed its error in this case. We believe the following quotations from its decision may be taken to constitute the core of its reasoning:

> "It is well settled that a state may withhold from a foreign corporation the privilege of doing business within its borders entirely. It may grant such privilege or authority on such conditions as it may deem fit. * * * The power of a state to exact a gross premium tax from a foreign insurance company for the privilege of doing business within the state is likewise well settled. Philadelphia Fire Association v. New York, 119 U. S. 100, 30 L. Ed. 342.

"It is the contention of plaintiff that because the gross premium tax involved is not payable and could not be computed or collected until the close of the year 1941, it cannot be held as a valid tax for the privilege of doing business in the state during that year.

"It is not essential that a privilege tax be paid before the exercise of the privilege. Payment may precede or follow the exercise of the privilege depending upon which system the Legislature chooses to adopt * * *.

"It is clear that payment of such tax at the end of the licensing year was intended * * *.

"In the case at bar, the state exacts payment on or before the last day of February of each year of a valid privilege tax, based upon gross premiums collected for the privilege of doing business in this state during the license year, expiring on the date upon which the tax was required to be paid, and also requires a showing of timely payment of such tax as a condition precedent to the issuance of a license for the ensuing year. As we have seen, the date when the payment for the privilege of doing business in the state is required is not material. It may be before or at the end of the license year."

The error consists in mistaking the nature of Appellant's objection to this tax. We contend that the character of the tax is immaterial, but that a discriminatory tax, although it be a privilege tax, which is made to apply to business transacted in Oklahoma by foreign insurance companies after they are admitted into said state, as is done by the said 4% gross premium tax statute in question, denies the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

The State seeks to justify the tax by the assertion that it is an admission fee not subject to the restrictions of the Fourteenth Amendment. It is in answer to that assertion

that we mention the time as of which the tax is imposed, for we say, in the language of Mr. Chief Justice Taft (272 U.S. 515):

> "By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign within the state, and tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the 14th Amendment."

The tax in question here, like the tax held invalid in the Hanover case, was not a valid condition precedent to admission to the State, but was "made to apply after" the foreign insurance company had been received into the state (Tit. 36, O. S. 1941, sec. 104, supra).

Not only by virtue of the authority of the Hanover case, but by its own inherent definition, a condition precedent is a requirement that must be fulfilled before the admission occurs.

In Oklahoma, upon paying an entrance fee of $200.00 (Constitution of Oklahoma, Art. XIX, sec. 2), satisfying the Insurance Commissioner that the company is qualified (Tit. 36, O. S. 1941, sec. 47), filing a copy of its charter and financial condition, satisfying the Insurance Commissioner that it is legally organized under the laws of the foreign state and that it has on deposit with the prescribed official certain designated securities, showing that it has a paid-up capital or guaranty capital or surplus of the prescribed amount, and that it appoint the Insurance Commissioner as its service agent (Tit. 36, O. S. 1941, sec. 101), the foreign insurance company is admitted to the state. Its admission is complete—there is no condition left unperformed.

At the end of the year for which it is licensed, it must make a report of the premium income received by it during that year just past, and pay a tax on such income, by virtue of the statute here in question (Tit. 36, O. S. 1941, sec. 104). Obviously, such a requirement, if a condition at all, must be a condition subsequent rather than a condition precedent. Conditions subsequent are not excepted from the limitations of the Fourteenth Amendment (*Hanover* v. *Carr*, supra).

It is contended in this case that the fact that a showing of the payment of this tax is made a condition precedent for renewal of the license for subsequent years makes it such an admission fee exempt from the constitutional requirement of equality. But the Illinois tax in the Hanover case was essentially identical in this regard, and the same contention made then was swept aside.

We are unable to find, by diligent inquiry, that the opinion in *Hanover* v. *Carr* has ever been overruled or questioned, and we therefore respectfully represent to this Honorable Court that it constitutes the most authoritative statement of the law on this subject. We also respectfully submit that the judgment of the Supreme Court of the State of Oklahoma herein fails to conform to the rules laid down by that decision.

The question is not foreclosed by the case of *Philadelphia Fire Association* v. *New York*, 119 U. S. 100, 30 L. ed. 342, 7 Sup. Ct. Rep. 108, cited by the Supreme Court of Oklahoma. If that case and the Hanover case be not distinguishable, the Hanover case, being the later, must be the better authority, but we respectfully submit that they are clearly distinguishable and that this Honorable Court, in rendering its opinion in the Hanover case, found them to be so. The Philadelphia Fire Association case was called to the attention of the Court in the later case

by counsel for defendant in error (71 L. e. 375) but was not followed. It was not found necessary even to mention it.

The distinction is plainly illustrated in the language used by Mr. Justice Blatchford in the next to the last paragraph of the Court's opinion (30 L. ed. 347). Therein he repeatedly characterized the levy there as "a license fee for the *future.*" The levy here in question is a tax "payable at the end of the year during which the privilege is granted by the State and exercised by the Insurance company" (Supreme Court of Oklahoma in its opinion herein). And in the Hanover case the levy in question was held to be a tax law "made to apply after" the foreign corporation had been admitted into the State.

The provisions of Section 1, Article XIX of the Constitution of the State of Oklahoma, hereinbefore quoted do not relieve the State of Oklahoma from granting to foreign insurance companies admitted to do business in the State the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. A similar requirement was found in the laws of the State of Illinois in *Hanover* v. *Carr*, supra.

There the Court said that the State cannot

> "• • • thus relieve itself from granting the equal protection of its laws to a foreign company which has met the conditions precedent to its becoming a *quasi* domestic citizen • • •" (p. 514).
>
> "• • • the state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed' (p. 507)."

This case presents questions of primary importance relating to the constitutionality of a form of tax, the rate of which has been increased from 2% to 4% after a period of approximately thirty-five years during which foreign

insurance companies had established in the State of Oklahoma a valuable and irreplaceable business representing the investment of extensive capital, and those questions have not heretofore been decided by the Supreme Court of the United States. A decision of that court is of pressing importance to the parties to this cause and to all foreign insurance companies doing business in Oklahoma, as well as to the insurance business generally.

The precedent established by the judgment of the Supreme Court of the State of Oklahoma is of the utmost importance to many Oklahoma insurance policyholders and in the interest of the public should be reviewed before the legislatures of various other states seek to adopt similar discriminatory laws. Aside from the novelty and importance of the issues presented, the decision below should be reviewed for the reason that it is clearly erroneous and not in accord with the principles of applicable decisions of this Court in the following cases, among others:

Hanover Fire Insurance Company v. *Harding*, 272 U. S. 494, 71 L. ed. 372, 47 S. Ct. 179;

Southern Railway Company v. *Greene*, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287;

Airway Electric Appliance Corporation v. *Day*, 266 U. S. 71, 69 L. ed. 169, 45 S. Ct. 12;

Concordia Fire Insurance Company v. *People of the State of Illinois*, 292 U. S. 535, 78 L. ed. 1411, 54 S. Ct. 830;

Quaker City Cab Company v. *Commonwealth of Pennsylvania*, 277 U. S. 389, 72 L. ed. 927, 48 S. Ct. 553;

St. Louis Cotton Compress Company v. *State of Arkansas*, 260 U. S. 346, 67 L. ed. 297, 43 S. Ct. 125;

Power Manufacturing Company v. *Saunders*, 274 U. S. 490, 71 L. ed. 1165, 47 S. Ct. 678;

Barbier v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 S. Ct. 357.

Insofar as the decision sustains the validity of the taxing act, we submit that it should be reviewed for the additional reason that it is not in accord with the principles of the following decision of the then Eighth Circuit Court of Appeals:

Sneed v. *Shaffer Oil and Refining Company*, 35 Fed. (2d) 21 (C. C. A. 8th Cir., Sept. 1929.)

WHEREFORE, we respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal.

Russell v. *Johnson.*

CHARLES E. FRANCE,
Attorney for Appellant.

EXHIBIT "1"

Filed in Supreme Court of Oklahoma, Dec. 12, 1944. Vivian S. Payne, Clerk.

IN THE DISTRICT COURT OF THE STATE OF OKLAHOMA, IN AND FOR OKLAHOMA COUNTY

No. 105,488

THE LINCON NATIONAL LIFE INSURANCE COMPANY, a Corporation, *Plaintiff*,

vs.

JESS G. READ, The Insurance Commissioner of the State of Oklahoma; and CARL B. SERRING, State Treasurer of the State of Oklahoma, *Defendants*.

Journal Entry

Now on this the 8th day of September, 1942, the above cause came on for hearing upon defendants' demurrer to the second amended petition of plaintiff, both parties being present by their respective attorneys of record; and the Court having examined the pleadings and having heard the argument of counsel, asked both parties to file briefs, and took the case under advisement.

Now on this the 11th day of September, 1942, said briefs having been filed and considered, this cause came on for decision upon said demurrer, the parties appearing, as aforesaid, and the Court being fully advised in the premises, and in consideration thereof, finds that neither Section 2, Article 19 of the Constitution of Oklahoma, Section 10478, Oklahoma Statutes 1931, or House Bill No. 353 of the 18th Oklahoma Legislature (Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941), nor the construction or application thereof by the Insurance Commissioner of Oklahoma referred to in plaintiff's second amended petition, violate the 14th Amendment of the Constitution of the United States or the Constitution of Oklahoma, and that neither said petition, nor the 1st, 2nd or 3rd causes of

action thereof state facts sufficient to constitute a cause of action in favor of plaintiff and against defendants, or either of them, and that hence defendants' demurrer to said petition and to each of its said causes of action should be sustained.

The Court further finds, in relation to said *first cause of action,* that under the pertinent constitutional and statutory provisions of this State, as construed in the case of New York Life Insurance Company v. Board of Commissioners of Oklahoma County, 155 Okla. 247, 9 Pac. (2d) 636, and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice:

(a) when a foreign insurance company desires, for the first time, to enter Oklahoma and to do business therein, it is required, among other things, to file an application for a license to enter Oklahoma and do business therein to and including the succe-ding last day of February, and to pay, on or before said date, a tax of two per centum (since April 25, 1941—four per centum) on all premium, less proper deductions, which it received in Oklahoma after it so enters the same and prior to the succeeding first day of January; that said tax is paid for the right or privilege of so entering Oklahoma and doing business therein to and including said last day of February, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms on said date, and

(b) when such a licensed company desires to enter Oklahoma and do business therein during the ensuing license year (March 1 to and including the succeeding last day of February), it is required, among other things, to file on or before the last day of February of the current license year, an application for a license to enter Oklahoma and do business therein during said ensuing license year, and, as a condition precedent, to show payment of a tax of two per centum

(since April 25, 1941—four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, which payment was made for the privilege of having been permitted to enter Oklahoma and to do business therein during the then current license year, and to pay, on or before the last day of February of said ensuing license year, a similar tax on all premiums, less proper deductions, which it receives in Oklahoma during the preceding calendar year; that said tax is paid for the right or privilege of having been permitted to enter Oklahoma and to do business therein during said ensuing license year, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms at the end of said year.

The Court also finds in relation to said *second cause of action*, that under the pertinent constitutional and statutory provisions of this State and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice, the words "after all cancellations are deducted" as used in Section 2, Article 19 of the Constitution of Oklahoma, and the words "after all cancellations and dividends to policyholders are deducted" as used in Section 10478, Oklahoma Statutes 1931, and Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, do not refer to or include cash surrender values paid by licensed foreign life insurance companies in this State to their Oklahoma policyholders.

The court further finds, in relation to said *third cause of action*, that under the express provisions of Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, and the uniform administrative practice of the State Insurance Commissioner since April 25, 1941, the effective date of said Act, said administrative practice being a matter of common knowledge of which the Court will take judicial notice, the annual four per cent tax on premiums

referred to in said section is levied and should be collected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, "within the twelve months next preceding the first day of January," 1942, as well as on all premiums, less proper deductions, received by said companies after said date.

It Is Therefore Ordered, Adjudged and Decreed by the Court that defendants' demurrer to plaintiff's second amended petition in the above cause be and the same is hereby sustained, to which findings and order plaintiff excepted, which exceptions are duly allowed. Thereupon plaintiff announced in open court its intention to stand upon its said petition and to refuse to plead further.

It Is Therefore Ordered, Adjudged and Decreed by the Court that the above case be dismissed at the cost of plaintiff, to which ruling and judgment of the Court plaintiff excepted, and its exceptions are duly allowed.

Thereupon, in open court, plaintiff gave notice of its intention to appeal to the Supreme Court of the State of Oklahoma, and, upon application of plaintiff and for good cause shown, it is ordered and adjudged by the Court that plaintiff be granted 30 days' time in addition to the time allowed by law to make and serve case-made on appeal to the Supreme Court of Oklahoma in said cause, defendants to have three (3) days thereafter in which to suggest amendments, the case-made to be signed and settled upon three (3) days' notice by either party.

Approved as to form

MILEY, HOFFMAN, WILLIAMS,
FRANCE & JOHNSON,
Attorneys for Plaintiff.

FRED HANSEN,
Asst. Atty. Gen.,
Attorney for Defendants.

(S.) LUCIUS BABCOCK,
District Judge.

EXHIBIT "2"

Filed in Supreme Court of Oklahoma. Nov. 21, 1944. Vivian S. Payne, Clerk.

Entered in Journal Record #16, Page 602, November 21st, 1944.

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 31338

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, a Corporation, *Plaintiff in Error,*

vs.

JESS G. READ, the Insurance Commissioner of the State of Oklahoma, and A. S. J. SHAW, State Treasurer of the State of Oklahoma, *Defendants in Error.*

Syllabus

1. A state may, subject to paramount authority of the Federal Constitution, withhold from foreign corporations the privilege of doing business within the state, or grant such privilege on such conditions do not require the surrender of rights guaranteed by the Federal Constitution.

2. A state may exact a gross premium tax from foreign insurance companies for the privilege of doing business within the state.

3. It is not an essential of a privilege tax exacted by a state from a foreign corporation for the privilege of doing business within the state that it be paid before the exercise of the privilege. Payment may precede or follow the exercise of the privilege.

4. The long-continued construction of a statute by department of government charged with its execution is entitled to great weight and should not be overturned without cogent reasons. Great Northern Life Insurance Com-

pany v. Read, Insurance Commissioner of Oklahoma, 136 Fed. 2d 44.

5. Payment of gross premium tax by foreign insurance companies on or before the expiration of the license year is exacted for the privilege of doing business within the State of Oklahoma during that license year and a showing that such tax has been paid is a condition precedent for the issuance of a license for the ensuing year.

6. It was within the power of the State of Oklahoma to change the requirements for the privilege of a foreign insurance company to do business within the State by increasing the rate of gross premium tax exacted for such privilege during the license year as to premiums collected after the effective date of the Act increasing the tax.

7. Imposition of gross premium tax on foreign insurance companies for the privilege of doing business within the State as provided by Sections 1 and 2 of Article 19 of the Constitution of the State of Oklahoma and Section 10478, O. C. 1931, and 36 O. S. 1941, Section 104, does not violate the 14th Amendment of the Federal Constitution, though no like tax is exacted from domestic insurance companies.

8. An insurance company's payment of cash surrender value of life insurance policies to the holders thereof and their surrender of the policies to the company does not effect cancellation of the policies within the meaning of Section 2, Article 19, of the Constitution and the statutes of Oklahoma requiring payment of a tax on all premiums collected in the State, "after all cancellations are deducted."

9. Statutes are to be construed as having a prospective operation unless the purpose and intention of the Legislature to give them a retrospective effect is expressly declared or is necessarily implied from the language used. In every case of doubt the doubt must be resolved against the retrospective effect. Good et al. v. Keel et al., 29 Okla. 325, 116 Pac. 777.

10. 36 O. S. 1941, Section 104, by which the rate of the gross premium tax on foreign insurance companies was in-

creased from 2% to 4%, effective April 25, 1941, was not specifically, nor by necessary implication, retroactive so as to apply the increased tax to the premiums collected in the year 1941, prior to the 25th day of April of that year.

Appeal from the District Court of Oklahoma County

Honorable Lucius Babcock, Judge

Affirmed in Part and Reversed in Part.

Miley, Hoffman, Williams, France & Johnson, Oklahoma City, for Plaintiff in Error.

Mac Q. Williamson, Attorney General, Fred Hansen, Assistant Attorney General, and Andy Crosby, Jr., Oklahoma City, for Defendants in Error.

RILEY, J.:

The Lincoln National Life Insurance Company is a corporation, organized under the laws of the State of Indiana, and is engaged in the life insurance business. Honorable Jess G. Read is the duly elected Insurance Commissioner of the State of Oklahoma.

On March 27, 1942, the Lincoln National Life Insurance Company, hereinafter referred to as plaintiff, commenced this action against Jess G. Read, Insurance Commissioner, and Carl B. Sebring, the then State Treasurer, hereinafter referred to as defendants, to recover the sum of $6,238.94 theretofore paid by plaintiff as the 4% premium or license tax, under the provisions of Sections 1 and 2, Article 19, of the Constitution of the State of Oklahoma, and Section 10478, O. S. 1931, as amended by Title 36, Chapter 1a, Session Laws 1941 (36 O. S. 1941, Section 104) and also referred to in the record as House Bill No. 353.

After the judgment herein reviewed was rendered, Honorable A. S. J. Shaw, who had in the meantime become State Treasurer, was substituted for Carl B. Sebring, State Treasurer, as party defendant. Plaintiff paid the license tax (or a part thereof) under protest, and brought this action to recover the entire amount of the taxes so paid. Defendants' demurrer to plaintiff's second amended petition, consisting of three alleged causes of action, was sustained.

Plaintiff elected to stand on the petition as amended, whereupon the court entered judgment dismissing the cause. Plaintiff appeals.

The first cause of action assails the validity of the annual tax of 2% on all premiums collected by plaintiff in the State under the provisions of Sections 1 and 2, Article 19, of the Constitution, and Section 10478, O. S. 1931. A tax of 4% on such premiums was provided by Section 1, Chapter 1a, Title 36, Session Laws 1941 (36 O. S. 1941, Section 104) House Bill No. 353, supra, amendatory of Section 10478, effective April 25, 1941. These provisions of statute were construed by the State Insurance Commissioner and deemed applicable to the premiums collected by plaintiff in this State during the entire year of 1941.

Plaintiff alleges that the provisions of sections 1 and 2, Article 19, of the Constitution of Oklahoma, and the statutory provision, as construed and applied by the Insurance Commissioner, unlawfully discriminate against plaintiff and in favor of life insurance companies organized under the laws of the State of Oklahoma which are not required to pay a gross premium tax, or any other similar tax. Thereby it is alleged that there is violation of the 14th Amendment of the Constitution of the United States, and that plaintiff is deprived of equal protection of the law.

The second cause of action assails that part of the tax (if any other part thereof is valid) which was claimed by the State Insurance Commissioner and paid by plaintiff which represents 4% on $73,408.21 of plaintiff's premium collections, which plaintiff claims should have been deducted on account of cash surrender values paid to policyholders upon surrender, return, and cancellation of policy contracts.

The third cause of action assails that part of the tax represented by the increase of the rate from 2% to 4% on premiums collected by plaintiff during the year 1941, and prior to April 25, 1941, the effective date of the Act amending Section 10478, supra.

Defendants' demurrer to the petition as amended is upon three grounds: (1) Want of jurisdiction in the court of the subject matter of the action; (2) that the suit is one against the State and that there is no legislative authority

or grant of the right to sue the State; and (3) that the petition as amended does not state facts sufficient to constitute a cause of action in favor of plaintiff and against defendant. The court sustained the demurrer upon the third ground. It is not contended here that either the first or second ground of the demurrer is well taken.

Section 1, Article 19, of the Constitution of the State of Oklahoma, provides:

> "No foreign insurance company shall be granted a license or permitted to do business in this State until it shall have complied with the laws of the State, including the deposit of such collateral or indemnity for the protection of its patrons within this State as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license."

Section 2 of Article 19 provides:

> "Until otherwsie provided by law, all foreign insurance companies * * * shall pay to the Insurance Commissioner for the use of the State an entrance fee as follows:
>
> "Each foreign Life Insurance Company, per annum, two hundred dollars; * * *
>
> "Until otherwise provided by law, domestic companies excepted, each insurance company, including surety and bond companies, doing business in this State, shall pay an annual tax of two per centum on all premiums collected in the State, after all cancellations are deducted, and a tax of three dollars on each local agent."

Section 10478, O. S. 1931 (first adopted in 1909), prior to the 1941 amendment, provided:

> "Every foreign insurance company doing business in this State under the provisions of this article shall, annually, on or before the last day of February, report

under oath of the president or secretary or other chief officer of such company to the insurance commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same time pay to the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of two per cent on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent; and such other fees as may be paid to said Insurance Commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the insurance commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State."

Said section, as amended in 1941, is substantially the same except the rate of the premium tax is 4% instead of 2%.

36 O. S. 1941, Section 56, provides that the Insurance Commissioner shall furnish each insurance company authorized to do business in the State blank forms upon which to make annual reports, and that such companies shall annually, on or before the last day of February, file with the Insurance Commissioner a statement under oath showing their financial condition as of December 31st of the previous year, and:

"* * * if the Insurance Commissioner finds that the facts warrant, and that all laws applicable to said

company are fully complied with, he shall issue to said company a license or certificate of authority, subject to all requirements and conditions of the law, to transact business in this State, specifying in said certificate the particular kind or kinds of insurance it is authorized to transact, and said certificate shall expire on the last day of February next after its issue: * * *"

The trial court in sustaining the demurrer held:

"* * * that neither Section 2, Article 19 of the Constitution of Oklahoma, Section 10478, Oklahoma Statutes, 1931, or House Bill 353 of the 18th Oklahoma Legislature (Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941), nor the construction or application thereof by the Insurance Commissioner of Oklahoma referred to in plaintiff's second amended petition, violate the 14th Amendment of the Constitution of the United States or the Constitution of Oklahoma, and that neither said petition nor the 1st, 2nd or 3rd causes of action thereof state facts sufficient to constitute a cause of action in favor of plaintiff and against defendants, or either of them, and that hence defendants' demurrer to said petition and to each of its said causes of action should be sustained. * * *"

With reference to the first cause of action, the trial court held:

"* * * under the pertinent constitutional and statutory provisions of this State, as construed in the case of New York Life Insurance Company v. Board of Commissioners of Oklahoma County, 155 Okla. 247, 9 Pac. (2d) 636, and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice:

"(A) when a foreign insurance company desires, for the first time, to enter Oklahoma and to do business therein, it is required, among other things, to file an application for a license to enter Oklahoma and do busi-

ness therein to and including the succeeding last day of February, and to pay, on or before said date, a tax of two per centum (since April 25, 1941—four per centum) on all premiums less proper deductions, which it receives in Oklahoma after it so enters the same and prior to the succeeding first day of January; that said tax is paid for the right or privilege of so entering Oklahoma and doing business therein to and including said last day of February, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms on said date, and

"(b) when such a licensed company desires to enter Oklahoma and do business therein during the ensuing license year (March 1 to and including the succeeding last day of February), it is required, among other things, to file on or before the last day of February of the current license year, an application for a license to enter Oklahoma and do business therein during said ensuing license year, and, as a condition precedent, to show payment of a tax of two per centum (since April 25, 1941—four per centum) on all premiums, less proper deductions, which it received in Oklahoma during the preceding calendar year, which payment was made for the privilege of having been permitted to enter Oklahoma and to do business therein during the then current license year, and to pay, on or before the last day of February of said ensuing license year, a similar tax on all premiums, less proper deductions, which it receives in Oklahoma during the preceding calendar year; that said tax is paid for the right or privilege of having been permitted to enter Oklahoma and to do business therein during said ensuing license year, and that the license issued by the Insurance Commissioner to said company expires by operation of law and its express terms at the end of said year."

As to the second cause of action, the court held:

> "* * * that under the pertinent constitutional and statutory provisions of this State and the uniform administrative practice of the State Insurance Commissioner since the effective date of the 1909 General Insurance Act of Oklahoma, said administrative practice being a matter of common knowledge of which the Court will take judicial notice, the words 'after all cancellations are deducted' as used in Section 2, Article 19, of the Constitution of Oklahoma, and the words 'after all cancellations and dividends to policyholders are deducted' as used in Section 10478, Oklahoma Statutes 1931, and Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, do not refer to or include cash surrender values paid by licensed foreign life insurance companies in this State to their Oklahoma policyholders."

With reference to the third cause of action, the court held:

> "* * * that under the express provisions of Section 1, Chapter 1a, Title 36, page 121, Oklahoma Session Laws 1941, and the uniform administrative practice of the State Insurance Commissioner since April 25, 1941, the effective date of said Act, said administrative practice being a matter of common knowledge of which the Court will take judicial notice, the annual four per cent tax on premiums referred to in said section is levied and should be collected on all premiums received by licensed foreign insurance companies in this State, less proper deductions, 'within the twelve months next preceding the first day of January,' 1942, as well as on all premiums, less proper deductions, received by said companies after said date."

It has been the uniform administrative practice of the Insurance Commissioner, since the effective date of the 1909 General Insurance Act of Oklahoma, when a foreign insurance company desires, for the first time to do busi-

ness in Oklahoma, to require it, among other things, to file an application for a license to expire on the last day of February next after its issue, and, on or before such date, to pay the gross premium tax imposed by law on all premiums, less proper deductions, received by it in Oklahoma from the date of the issuance of its license to and including the 31st day of December next; and when a foreign insurance company holding a license to do business in Oklahoma during any license year desires to do business therein during the ensuing license year, to require it, among other things, (a) to file, on or before the last day of February of the current license year, an application for a license for the ensuing year; (b) to pay the gross premium tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year, as a condition precedent to the issuance of the license for the ensuing year; and (c) to pay, on or before the last day of February of the ensuing license year the gross premium tax on all premiums, less proper deductions, received by it in Oklahoma during the preceding calendar year; and since the effective date of such Act the Insurance Commissioner has uniformly interpreted such Act as providing for a license, to expire on the last day of February next after its issuance; and in issuing renewal licenses has uniformly construed it as requiring the payment, on or before the last day of February in each year, of the gross premium tax for the right or privilege of entering Oklahoma and doing business therein during the license year expiring on that date.

Under the law licenses issued to foreign insurance companies expire on the last day of February next after the date of their issuance. If the construction and interpretation by the administrative officer and the court of the constitutional and statutory provisions quoted above is permissible, there is no invalidity in the gross premium tax therein provided.

It is well settled that a state may withhold from a foreign corporation the privilege of doing business within its borders entirely. It may grant such privilege or authority on such conditions as it may deem fit. Williams *v.*

Standard Oil Company of Louisiana, 278 U. S. 235, 73 L. 2d. 287; Hanover Fire Insurance Company *v.* Carr, Treasurer, 272 U. S. 494, 71 L. 3d. 372. These general rules are subject to a well-settled qualification that a state may not impose conditions which require the surrender of rights guaranteed by the Federal Constitution. The power of a state to exact a gross premium tax from a foreign insurance company for the privilege of doing business within the state is likewise well settled. Philadelphia Fire Association *v.* New York, 119 U. S. 100, 30 L. ed. 342.

It is the contention of plaintiff that because the gross premium tax involved is not payable and could not be computed or collected until the close of the year 1941, it cannot be held as a valid tax for the privilege of doing business in the State during that year.

It is not essential that a privilege tax be paid before the exercise of the privilege. Payment may precede or follow the exercise of the privilege, depending upon which system the Legislature chooses to adopt. Carpenter, Insurance Commissioner, *v.* Peoples Mutual Insurance Company (Calif.), 74 Pac. 2d 508; William A. Slater Mills, Inc., *v.* Gilpatric, State Treasurer, 117 Atl. 806; Pacific Mutual Life Insurance Company v. Hobbs, Commissioner of Insurance (Kan.), 103 Pac. 2d 854.

In the latter case it was held:

> "1. The statute requiring foreign insurance companies, at the time of making annual statements required by law, to pay taxes on the gross amount of premiums received by them for business done in the state during the preceding year, imposes taxes, payable at the end of the year, for the privilege of doing business in the state."
>
> "3. The tax on gross premiums received by foreign insurance companies for business done in the state is an 'excise tax' in the nature of a franchise or privilege tax on the privilege of doing business, and partakes of the nature of a license tax in the sense that payment thereof is required as a condition prece-

dent to the renewal of certificates of authority of such companies."

In the body of the opinion it is stated:

"The tax is an excise or privilege tax. The company was given the privilege of doing business in the state. Upon what basis is the tax to be imposed? Obviously upon the volume of business done during the previous year. On the 1st day of January or within sixty days thereafter, the company is required to make a return showing the business done during the previous year. The tax is on the privilege of doing business in the State,—the tax is fixed at a percentage of premiums received during the preceding year. The payment of the tax follows the exercise of the privilege. The method selected appears to be both equitable and convenient."

Sections 1 and 2, Article 19, of the Constitution, together with the statutory provisions above quoted, permit the construction that the payment of a gross premium tax on or before the expiration of the license year for the privilege of doing business in the State during the license year is a condition precedent to the issuance of a license for the ensuing year. This has been the uniform construction and application of the law by the executive department of the State charged with the administration of the law. It was in effect so held by the trial court. See, also, Great Northern Life Insurance Company, a corporation, v. Jess G. Read, Insurance Commissioner for the State of Oklahoma, 136 Fed. 2d 44, (pending on proceedings in error in the Supreme Court of the United States). That the law calls for the payment of the tax for the privilege of doing business in this State is clear by the provisions of Sections 1 and 2, Article 19 of the Constitution. Section 1 prohibits the licensing of all foreign insurance companies to do business in this State until they they shall have complied with the laws of the State and shall have agreed to pay all taxes and fees as may at any time be imposed by law or Act of the Legislature. Section 2 of Article 19

prescribes one fee a foreign life insurance company is required to pay, namely, $200.00 per annum. The amount of that fee may not be changed except by amendment of the Constitution. The latter part of Section 2 fixes the tax which foreign insurance companies were required to pay until otherwise provided by law, namely, the annual tax of two per centum on all premiums collected in the State after all cancellations are deducted. That was the tax imposed by law referred to in Section 1. That tax was subject to change by the Legislature. It was so changed in 1909 (Section 10478, supra) by allowing deductions for dividends paid to policyholders as well as all cancellations and by adding an annual tax of $3.00 on each local agent. That Act made such taxes payable to the State Insurance Commissioner and provided that the tax should be in lieu of all other taxes or fees of any subdivision or municipality of the State. The only material change made by the 1941 amendment is to increase the rate of tax from two per centum to four per centum.

It is clear that payment of such tax at the end of the licensing year was intended. The reason is that the amount of such tax is dependent on the amount of premiums collected during the taxing year and could not be determined until the end of such year. The tax imposed is clearly a privilege tax. New York Life Insurance Company v. Board of Commissioners of Oklahoma County, 155 Okla. 247, 9 Pac. 2d 936. It is payable at the end of the year during which the privilege is granted by the State and exercised by the insurance company. This is in accord with the departmental construction of the law for more than thirty years. Such departmental construction does not appear to have been challenged by any foreign insurance company during the thirty-two years from 1909 until the amendment of 1941. This long-continued departmental construction should not be overturned without cogent reasons. Globe Indemnity Company v. Bruce, 81 Fed. 2d 143; City of Tulsa v. Southwestern Bell Telephone Company, 75 Fed. 2d 343; United States v. Jackson, 280 U. S. 183, 74 L. ed. 361; Federal Land Bank v. Warner, 292 U. S. 53, 78 L. ed. 1120.

Plaintiff cites and relies strongly on Hanover Fire Insurance Company v. Carr, 272 U. S. 494, 71 L. ed. 372, supra. It relies on the fact that the tax there involved was held to violate the 14th Amendment and deprived the insurance company of equal protection of the law. That case may well be distinguished from the case at bar as to the tax there held to be invalid. The Hanover Fire Insurance Company was an insurance Company organized under the laws of the State of New York. It had for a number of years conducted a fire insurance business in South Chicago, Cook County, Illinois, through agencies maintained there. In 1919, the state of Illinois enacted a statute which provided that each foreign corporation licensed and admitted to do an insurance business in the state should pay an annual state tax for the privilege of doing business in the state equal to two per centum of the gross amount of premiums received by it during the preceding calendar year on contracts covering risks within the state, after certain deductions, and that such tax should be in lieu of all license fees or privilege or occupation taxes levied or assessed by any municipality of the state, but this should not be construed so as to prohibit the levy and collection of any state, county or municipal taxes upon the real and personal property of such corporations. There was no contention as to the validity of that tax. The State of Illinois also had in effect a statute known as the Fire and Marine Insurance Act of 1869, as amended (Cahill's Rev. Stat. 1925, Chapter 73) Section 30 of said Act in part provided:

> "Every agent of any insurance company, incorporated by the authority of any other state of government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency for the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes—state, county, town and municipal—that other personal property is subject to at the place where located; * * *"

A general revenue Act of the State of Illinois, adopted in 1898, required personal property to be valued at its fair cash value and set down in one column headed "Full Value" and one-half thereof to be ascertained and set down in another column headed "Assessed Value." In 1923, and for many years prior thereto, by what was called an equalization, systematically and intentionally carried out, the amount set down in the "Full Value" column was not more that 60% of the actual fair cash value of personal property returned, and the amount set down in the "Assessed Value" column was not more that 30% of the actual, fair cash value, so that taxes on personal property would be levied and collected on an assessed value of 30% of the full or fair cash value of the property. For a long time and in a long line of decisions the Supreme Court of Illinois had held that the tax imposed by Section 30, supra, on the net receipts of foreign insurance companies was a tax on personal property. Accordingly, such net receipts had been treated as personal property. The law was enforced under that construction for a long time, with full acquiescence by the foreign insurance companies. But in June, 1923, in People ex rel. Chicago v. Barrett, 309 Ill. 53, 139 N. E. 903, the Supreme Court of Illinois held that said tax was an occupation tax and that the value of the net receipts of foreign insurance companies should not be reduced as in the case of personal property. The result was that the tax imposed by Section 30, supra, was more than trebled. It was this tax so increased which was attacked in the Hanover case, supra. It appears that after said decision the taxing authorities of Cook County, Illinois, valued and assessed the net premium receipts at their full value and levied a tax accordingly, and issued a wararnt for the collection of the same. To prevent a distraint of its property, the Hanover Company brought an action against the tax collector for an injunction. The trial court denied relief and the Supreme Court affirmed the Superior Court. Hanover Fire Insurance Company v. Carr, 317 Ill. 366. The case was taken by writ of certiorari to the Supreme Court of the United States. There it was held in effect that the

tax under the law as last construed by the Supreme Court of Illinois worked an unlawful discrimination against the Hanover Fire Insurance Company. It was held that the authority or license granted under the 1919 Act, for which the Hanover Company paid the 2% tax on gross premiums received by it, put said company on a level with domestic insurance companies doing a like business; that compliance with Section 30 of said Act was not a condition precedent to permission to do business in Illinois. The tax under the law as previously construed, however, was in substance upheld. With reference thereto the court said:

"* * * Under the previous decisions of the supreme court of Illinois, when the net receipts were treated as personal property and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations in that the net receipts were personal property acquired during the year and removed by foreign companies out of the state, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property including their net receipts or what they were invested in. It was this view, doubtless, which led to the acquiescence by the state authorities and the foreign insurance companies in such a construction of § 30 and in the practice under it. * * *"

Final disposition of the Hanover case, as shown in Hanover Fire Insurance Company v. Harding, County Collector, 158 N. E. 849, is that the tax was upheld as upon a debased or decreased valuation of the net receipts in accordance with the former decisions. The 2% gross premium tax levied under the law in Illinois, almost the same as the Oklahoma law as construed by the department and the court below as a privilege tax or license tax, was upheld.

In the case at bar, the State exacts payment on or before the last day of February of each year of a valid privilege tax, based upon gross premiums collected for

the privilege of doing business in this State during the license year, expiring on the date upon which the tax was required to be paid, and also requires a showing of timely payment of such tax as a condition precedent to the issuance of a license for the ensuing year. As we have seen, the date when the payment for the privilege of doing business in the State is required is not material. It may be before or at the end of the license year.

Incidentally, it may be noted that the plaintiff did not protest payment of the tax as a whole. Examination of the two protests filed, copies of which are attached to the amended petition, show that in the first protest, dated February 26, 1942, only $1,651.31 was protested. That was protested as being tax in excess of 2% of all premiums collected in Oklahoma on insurance policies during the calendar year of 1941. In the second protest, dated March 17, 1942, $2,936.33 was protested as a tax excessive and void because deductions claimed for cancellations were not allowed by the Insurance Commissioner. That made a total tax protested of $4,587.64. The total amount paid and the amount sued for was alleged to be $6,238.94. That leaves $1,631.30 not protested. Evidently plaintiff, at the time it filed its protests, considered the 2% levied by the law under Section 10478, before its amendment, was a valid tax. At least it did not protest that part thereof.

From the foregoing authorities we conclude that 36 O. S. 1941, Section 104, does not violate the 14th Amendment, and does not deprive the plaintiff of equal protection of the law.

We next consider the demurrer as applied to the second cause of action. The question is presented by plaintiff in its brief under the third proposition. Thereunder plaintiff contends that the "Cancellations" to be deducted as provided in the Constitution and statutes above referred to necessarily consist of the return of premiums, including cash surrender values paid to policyholders, according to the terms and provisions of the life insurance contracts. The argument is that these funds are accumulated under the level premium plan by charging during the early years of the policy, a net premium which is larger than is neces-

sary to pay for the insurance in those years, with a view of accumulating a fund large enough to enable the company to meet the cost of insurance in the later years of life of the insured when the net premium is insufficient to pay for the current cost of protection, and that upon surrender of the policy by the insured, the payment to him of the "cash surrender value" is nothing more than a return of the excess part of the premiums theretofore charged and collected with an assumed rate of interest, and is but a return of money that in reality belongs to the insured. Ondifficulity with that theory is that the "assumed rate of interest" is not necessarily the actual rate of interest or income derived from the use of such money while in the hands of the insurer.

The defendants contend that the words "after all cancellations are deducted" refer only to the unearned parts of premiums on insurance policies collected in advance for a given term where the policies are canceled prior to the expiration of such term under the provisions of the policy or of the law relating thereto, and which unearned premiums are returned to the policy holder; that when used in connection with a life insurance policy, the words are applicable only in instances where policies have been procured by fraud, mistake, etc., and the policies are canceled and the premium is returned without respect to the length of time the policy has been in existence; that the return of the entire premium collected in such cases is called for because the policy never had any validity and no risk was ever assumed thereunder.

There is no case cited by plaintiff directly in point. Volunteer State Life Insurance Company v. Larson, State Treasurer (Fla.), 2 So. 2d 386, construed a statute similar to our constitutional and statutory provisions, which directed the State Treasurer in collecting the amount due upon a gross premium tax of 2% to omit or deduct "return premiums and cancellations." Our law directs deduction of "all cancellations and dividends paid to policyholders."

The Supreme Court of Florida, in Volunteer State Life Insurance Company v. Larson, supra, stated in substance, as contended for by plaintiff in the case at bar, that "the legislation is so clear and well fixed that the duty of the

court is to follow the plain language implied by it." It was there held that deductions for surrender value of the policies, paid to the policy holders during the year, were required. But State ex rel. Pacific Mutual Life Insurance Company v. Larson, State Treasurer, etc. (Fla.), 12 So. 2d 896, expressly overrules Volunteer State Life Insurance Company v. Larson, supra. In State ex rel. Pacific Mutual Life Insurance Company v. Larson, supra, it is pointed out that the cash surrender values on policies of life insurance are property rights generally created or established by the provisions of the contracts of life insurance. In the opinion it was stated:

> "Various items, according to each contract, may enter into, include, and compose the property right recognized as the 'cash surrender value of a policy.' The payment by the insurance company to the policyholder of the 'cash surrender value of a policy' and the surrender thereof by the policyholder to the insurance company is not a 'cancellation' within the terms of the Act, but is simply a performance of the obligations of the contract as originally entered into by the parties. The policy, when cashed and surrendered as between the parties, becomes functus officio. It was not the intention of the Legislature when using the term 'cancellation' to make it embrace or include the 'cash surrender value of a policy' of life insurance."

We approve the statements there made. It is clear that the payments of the cash surrender value as provided in the policies are but the fullfilment of the contracts of insurance as written. It is no more a cancellation of the policy within the meaning of the Constitution and statutes than is the full payment on insurance policies at maturity or the payment of the principal amount of the contract upon the death of the insured. In either case the provisions of the policies are performed.

We hold that the payment for cash surrender value as provided for in the policy is not a cancellation within the terms or within the meaning of the Constitution and statutes.

There was no error in sustaining the demurrer as to the second cause of action.

Under the second proposition in plaintiff's brief, going to the third cause of action, it is contended that the increase in the tax from 2% to 4% effective April 25, 1941, could in no event operate as to premiums collected by plaintiff prior to April 25, 1941.

As applied to plaintiff's third cause of action, the petition as amended does not challenge the validity of the increase in the rate of tax from 2% to 4% as to premiums collected after April 25, 1941. It goes only to the validity of the increase of the tax as applied to premiums collected in 1941, prior to April 25th. That part of the tax was not specifically protested.

68 O. S. 1941, Section 15.50, under which authority for an action of this nature is given, requires that the notice (protest) to the collecting officer shall show the "grounds of complaint." The Attorney General makes no contention that the notice or protest here involved is insufficient. We therefore treat it as sufficient to raise the question here presented.

The sole question involved is whether increase in rate of taxes to be paid is legally applicable to premiums collected in 1941 but prior to April 25th, the effective date of the Act raising the rate of the tax. By the language used in the statute, as amended the increased rate is not specifically made retroactive. The general rule is that statutes are not to be construed as having a prospective operation unless the purpose and intention of the Legislature to give them retrospective effect is expressly declared or is necessarily implied from the language used. In every case of doubt, the doubt must be resolved against the retrospective effect. Good et al. v. Keel et al., 29 Okla. 325, 116 Pac. 777; People ex rel. Mutual Trust Company of Westchester County v. Miller, Comptroller, 177 N. Y. 51, 69 N. E. 124; Blodgett v. Holden, 275 U. S. 142, 72 L. ed. 206; Lewellyn v. Frick, 268 U. S. 238, 69 L. ed. 934.

In Good v. Keel, supra, it is said:

"This general rule has been applied to a great variety of statutes, including the uniform negotiable in-

> struments law, usury laws, statutes levying taxes, relating to defenses to actions on insurance policies, relating to damages for wrongs, providing for rendition of deficieney judgments upon sale of mortgaged premises, limiting the time for the commencement of actions, declaring certain contracts void, regulating parties who may sue for death by wrongful act, or the manner of distribution of the amount recovered, modifying the fellow servant rule, relating to plans for bridges over railroad tracks, relating to mechanics' liens, defining the boundary of a city, etc. • • • ,,

This being a tax for the privilege of doing business within the State during the year for which the privilege is granted by the State and exercised by the insurance company, as we have held, plaintiff became subject to the increased rate during the license year. But there is nothing in the Act which specifically provides that the increased rate should apply to premiums collected prior to the effective date of the Act increasing the rate. Neither can it be said that such application is necessarily implied from the language used in the Act. Tested by the rule stated above, the Act must be construed so as to apply the increased rate only to the premiums collected after the effective date of the Act.

The petition alleged the amount of premiums collected in 1941 before April 25th, and alleged the amount of dividends paid to policyholders during that time. Therefore, plaintiff's petition as to the third cause of action stated facts sufficient to constitute a cause of action for the recovery of the amount of taxes, hereinafter set forth, paid by plaintiff in error by reason of the application of the increased rate to the premiums collected prior to the effective date of the Act increasing the rate.

The parties having filed herein their joint motion and stipulation whereby they agree that there exists no issue as to the facts set out in the petition and that the amount of the tax involved in said third cause of action is the sum of $847.18, and pray that this Court completely determine and adjudicate this action. This Court is vested with jurisdiction of the parties and subject matter involved. Further proceedings in the trial court could result in no benefit to

any of the parties and would only involve the litigants in more expense and delay and nothing could be gained thereby. The approval of said stipulation is in the furtherance of justice.

The order of the trial court in sustaining the demurrer to the first and second causes of action is affirmed.

The order sustaining the demurrer to the third cause of action and the judgment dismissing the petition are reversed.

The court, in consideration of the premises, finds and determines that $847.18 of the $6,238.94 sued for by plaintiff in error was illegally collected, as not being due the State of Oklahoma, but that the remainder of said sum, to-wit, $5,391.76, was legally collected, as being due the State of Oklahoma.

It is, therefore, ordered, adjudged and decreed by the Court that the first and second causes of action of the petition of plaintiff in error be and the same are hereby dismissed and that the legal amount of taxes due by plaintiff in error to the State of Oklahoma is the said sum of $5,391.76.

It is also ordered, adjudged and decreed by the Court that the said sum of $67.18 so paid is in excess of the legal and correct amount due by plaintiff in error to the State of Oklahoma, and defendants in error are hereby ordered and directed to pay said excess to plaintiff in error and to take its receipt therefor.

It is further ordered and adjudged that the costs herein be paid by plaintiff in error.

Concur: Corn, C. J., and Osborn, Bayless, Welch, Hurst, Davidson and Arnold, JJ.

Dissent: Gibson, V. C. J., dissents to paragraph 8 of the syllabus and to that part of the opinion of which said paragraph 8 is representative, but concurs in the remainder of said opinion.

Supreme Court of the United States

(OCTOBER TERM, 1944)

No. 833

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
a corporation,
Appellant,

VERSUS

JESS G. READ, the Insurance Commissioner of the State of Oklahoma, ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF APPELLANT

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March, 1945.

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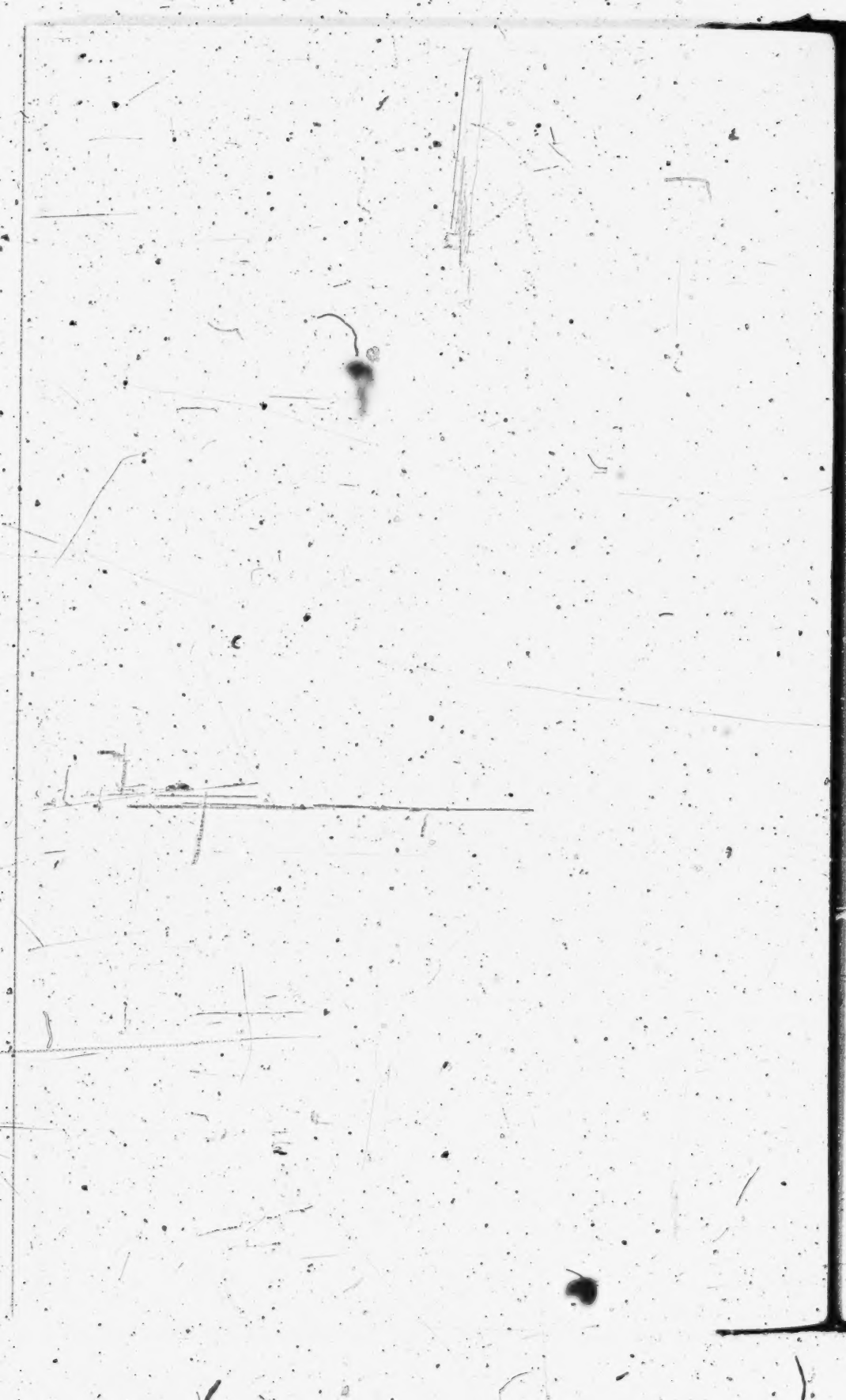

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GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

I. The statutory provision sustaining the jurisdiction of this Court is Section 237(a) of the Judicial Code as amended [Tit. 28, Sec. 344(a) U. S. C. A.]

—Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239;

Jett Bros. Distilling Co. v. *Carrollton*, 252 U. S. 1, 64 L. Ed. 421;

Western Turf Assn. v. *Greenberg*, 204 U. S. 359, 51 L. Ed. 520.

II. The statutes of the State of Oklahoma, the validity of which are drawn in question, are:

Section 1, Chapter 1a, Title 36, page 121, Session Laws of Oklahoma 1941 (Tit. 36, Okla. Stat. 1941, Sec. 104), approved and in force April 25, 1941 (R. 24, 49).

Section 10478, Okla. Stat. 1931 (substantially the same as said 1941 statute except rate of tax is 2% instead of 4%) (R. 25, 49).

Sections 1 and 2, Article XIX of the Constitution of Oklahoma (R. 24, 29, 49).

III. Date of entry of judgment to be reviewed: November 21, 1944 (R. 50).

IV. Date petition for appeal presented: December 12, 1944 (R. 68).

V. Date order allowing appeal: December 12, 1944 (R. 74).

VI. The statutes of Oklahoma above mentioned deny to appellant the equal protection of the laws and deprive appellant of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 28-29).

Protest of appellant before Insurance Commissioner (R. 7, 11).

Allegations contained in first cause of action in petition of appellant in District Court of Oklahoma County, Oklahoma (R. 23-30).

VII. Ruling of trial court against the contentions of appellant set forth in the preceding paragraph (R. 34).

VIII. Ruling of the Supreme Court of Oklahoma against the contentions of appellant set forth in paragraph VI above (R. 49).

Judgment of the Supreme Court of Oklahoma affirming the decree of the trial court denying these constitutional rights to appellant (R. 67).

IX. The provision under which jurisdiction is invoked is Section 1 of Amendment XIV to the Constitution of the United States.

X. The Federal questions involved are substantial in character.

—*Hanover Fire Ins. Co.* v. *Harding*,
272 U. S. 494, 71 L. Ed. 372;

Southern Railway Co. v. *Greene*,
216 U. S. 400, 54 L. Ed. 536;

Concordia Fire Ins. Co. v. *Illinois*,
292 U. S. 535, 78 L. Ed. 1411;

Galveston, H. & S. A. R. Co. v. *Texas*,
210 U. S. 217, 227, 52 L. Ed. 1031, 1037;

St. Louis Cotton Compress Co. v. *Arkansas*,
260 U. S. 346, 358, 67 L. Ed. 297, 299;

Power Mfg. Co. v. *Saunders*,
274 U. S. 490, 71 L. Ed. 1165, 1169;

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277 U. S. 389, 72 L. Ed. 927;

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278 U. S. 1, 13, 73 L. Ed. 147, 154;

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271 U. S. 583, 70 L. Ed. 1101.

In the

Supreme Court of the United States

(OCTOBER TERM, 1944)

No. 833

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
a corporation,
Appellant,

VERSUS

JESS G. READ, the Insurance Commissioner of the
State of Oklahoma, ET AL.,
Appellees.

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an appeal under Section 237(a) of the Judicial Code, 28 U.S.C.A., Sec. 344(a), from the judgment of the Oklahoma Supreme Court, wherein it is held that the laws of Oklahoma under which a tax is imposed on gross premiums collected by foreign insurance companies in Oklahoma do not violate the Fourteenth Amendment to the Federal Constitution, and do not deny such companies

the equal protection of the laws, though no like or any other similar tax is exacted from competing domestic insurance companies.

The discriminatory nature of the tax is admitted, which brings into focus the controlling questions, viz: Is the tax under consideration, in substance and effect, a fee or condition precedent to admission of foreign corporations into the State and outside the guaranties of the Fourteenth Amendment, or is it a tax that must conform to the equal protection clause of the Fourteenth Amendment?

The Oklahoma Supreme Court (R. 48-68) sustained the constitutionality as construed and applied to appellant of Section 1 and 2, Article XIX of the Constitution of Oklahoma (*Appendix, p. i*), Section 10478, Oklahoma Statutes 1931, hereinafter referred to as the 2% statute (Section 22, General Insurance Act of 1909, as amended, *Appendix, p. viii*), and Section 104, Title 36, Oklahoma Statutes 1941, hereinafter referred to as the 4% statute (Sec. 1, Ch. 1a, Title 36, Session Laws of Oklahoma, 1941, *Appendix, p. xii*). The former 2% statute and the present 4% statute are identical in all material respects, except the rate of tax is by the present statute increased from 2% to 4%.

Appellant reported the gross premiums collected in Oklahoma during the calendar year 1941 and paid under protest the tax required by the 4% statute, and brought this suit to recover the amount so paid (R. 23). Appellees filed their demurrer to appellant's petition (R. 33), and the cause was heard and decided in the trial court upon

the third ground of said demurrer, viz: That the petition does not state facts sufficient to constitute a cause of action (R. 33-34).

Three causes of action are alleged in the petition, all of which were finally determined by the judgment of the Oklahoma Supreme Court (R. 67-68). The second and third causes of action do not raise Federal questions and are alleged only in the event of a judicial determination that either the 2% or the 4% statute is constitutional (R. 30-31).

The question presented here is one arising alone upon the legal conclusions proper to be drawn as to the effect of the 2% and 4% statutes from the facts alleged in appellant's petition and the operation of such statutes as construed and applied by the Supreme Court of Oklahoma.

The allegations which present the Federal questions here are contained in the first cause of action in appellant's petition and may be stated briefly: The provisions of the present 4% statute (R. 24-25). The provisions of the former 2% statute (R. 25). The provisions of Section 1, Article XIX of the Oklahoma Constitution (R. 29-30). Appellant is an Indiana life insurance corporation (R. 23). In 1919 it qualified and was admitted to do business in Oklahoma. It has thereafter continued to do business in Oklahoma and has paid each year an annual license fee of $200.00 (R. 27-28). Appellant has built up good will and has established a valuable life insurance business in Oklahoma, the assets of which are without use or value

to others. Appellant would be deprived of the equal protection of the laws and of its property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution, if it were deprived of the privilege of doing business in Oklahoma or subjected to the taxes threatened by the 4% statute and the acts of appellees (R. 28). Domestic insurance corporations competing with appellant in Oklahoma are not required to pay the onerous tax of 4% or at any other rate upon the premiums collected by them in Oklahoma. There is no material distinction between appellant and competing domestic insurance corporations and no reasonable basis for classifying them separately. The 4% statute was enacted as a revenue-producing measure to provide general funds for the operation of the State Government and the State Firemen's Relief and Pension Fund. The 4% statute is not a regulatory measure enacted under the police power, nor are the funds demanded commensurate with the expense of regulating the affairs of foreign insurance corporations. The 4% statute discriminates between appellant and competing domestic corporations, to the advantage of the latter and to the prejudice of appellant, and denies to appellant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States (R. 28-29). Section 1, Article XIX of the Oklahoma Constitution attempts to exact as a condition on foreign insurance companies engaging in business in Oklahoma that the rights of such corporations guaranteed under the Federal Constitution be waived (R. 29-30). Appellant reported,

as required by law, the gross premiums collected by it in Oklahoma during the calendar year 1941 in the amount of $156,897.19, and paid to the appellee, Insurance Commissioner, the sum of $6,238.94, representing a tax of 4% on said gross premiums less a lawful deduction of $923.80 covering dividends paid to policyholders (R. 25-27). Appellant paid said taxes involuntarily and pursuant to the demands of appellee, Insurance Commissioner, to avoid the statutory forfeiture and penalties, revocation of its agents' certificates of authority, its debarment from doing business in Oklahoma, and threatened deprivation and loss of its rights, interests, investments, and property in Oklahoma (R. 27). At the time appellant paid such taxes it served notice of protest according to law upon appellees (R. 7, 11, 27).

The tax imposed by the statutes in question is not a substitute for or in lieu of ad valorem tax upon personal property of a foreign insurance company. *New York Life Ins. Co.* v. *Board of Com'rs of Oklahoma Co.*, 155 Okla. 247, 9 Pac. (2d) 936.

The discriminatory character of the gross premium statute, *supra*, and its revenue-producing purpose stand as admitted upon the pleadings, and further accord in that regard is revealed in the briefs of appellant and appellees in the Supreme Court of Oklahoma (R. 41-43). The following is found in said brief of appellees:

> "* * * in order that the Court may not misunderstand defendants' conception of the discriminatory character of the premium tax involved here, both be-

fore and after it was increased in 1941 from two per cent to four per cent, we desire to state that we fully agree with plaintiff's statements on page 18 of its brief, (same being in relation to matters of common knowledge in which the Court may take judicial notice) that

"'the tax of 4% of all premiums, less proper deductions, collected by the plaintiff insurance company in the State of Oklahoma, is not collected on like premiums of competing domestic insurance companies and the only tax collected from said latter companies not collected from the plaintiff insurance company is a state income tax amount to approximately one-twentieth of said 4% tax (or one-tenth of said 2% tax).'

And

"'The expenses of the State Insurance Department since statehood until December 31st, 1941, have been approximately 3.55% of the amount collected from the former 2% premium tax and other receipts, and since said latter date said expenses have been approximately 2% of the amount collected from the present 4% premium tax and other receipts.'"

The General Insurance Act of 1909 governs and regulates the conduct of domestic as well as foreign insurance companies doing business in Oklahoma. The pertinent provisions of that Act as carried forward into the Oklahoma Statutes of 1941 appear in the Appendix at pages iii-xi. Section 22 of that Act imposes the 2% gross premium tax which was carried forward in Section 10478, Oklahoma Statutes 1931 (*Appendix, p. viii*).

Annual licenses issued to domestic insurance companies as well as foreign insurance companies expire on the last day of February next after the date of their issuance. The following conditions precedent are prescribed for admission of a foreign insurance company into Oklahoma, to-wit:

1. Payment of the entrance fee ($25.00 to $200.00, depending on the type of company), as provided by Section 2, Article XIX of the Constitution (*Appendix, p. i*).

2. Satisfy the Insurance Commissioner that the company is qualified as prescribed by Section 11 of the General Insurance Act of 1909 (*Appendix, p. iii*).

3. Compliance with the conditions of admission prescribed by Section 18 of the General Insurance Act of 1909, namely, (a) file a copy of its charter and statement of financial condition; (b) satisfy the Insurance Commissioner of its legal organization in the foreign state and that designated securities are on deposit with proper officials; (c) that it has a paid-up or guaranty capital, or surplus, of the prescribed amount; (d) appoint the Insurance Commissioner as its service agent (*Appendix, p. v*).

The trial court entered its judgment wherein: It made express findings of fact as to the manner in which the statutes in question operate and apply. It expressly found

that neither Section 2, Article XIX of the Oklahoma Consituation, the 2% statute, the 4% statute, nor the construction or application thereof by the appellee, Insurance Commissioner violate the Fourteenth Amendment. It sustained appellees' demurrer and dismissed the case (R. 33-36).

The Supreme Court of Oklahoma on the appeal affirmed the decree of the trial court in dismissing appellant's first cause of action, and held that the imposition of the tax as provided by Sections 1 and 2, Article XIX of the Oklahoma Constitution, the 2% statute, and the 4% statute, does not violate the Fourteenth Amendment (R. 49, 67).

The operation and characterization of the gross premium tax laws in question are revealed in the express findings of the Oklahoma Supreme Court as to the uniform administrative practice since 1909 (R. 56-57) and the following quotations from its opinion:

> "It is clear that payment of such tax at the end of the licensing year was intended. The reason is that the amount of such tax is dependent on the amount of premiums collected during the taxing year and could not be determined until the end of such year. The tax imposed is clearly a privilege tax. * * * It is payable at the end of the year during which the privilege is granted by the State and exercised by the insurance company. * * *" (R. 59).
>
> "In the case at bar, the State exacts payment on or before the last day of February of each year of a valid privilege tax, based upon gross premiums collected for the privilege of doing business in this State

during the license year, expiring on the date upon which the tax is required to be paid, and also requires a showing of timely payment of such tax as a condition precedent to the issuance of a license for the ensuing year" (R. 62).

The effect of the decision of the Supreme Court of Oklahoma in the case at bar is to sustain a tax law enacted for revenue purposes, which discriminates heavily against foreign insurance companies, even though such law operates and applies each year after said companies receive their annual licenses to transact business in Oklahoma. Such discrimination is erroneously justified and excused on the ground that the tax is paid for the privilege of doing business in Oklahoma.

The present case collaterally affects much more than the amount directly in issue. Under the present rate of 4% the tax law in issue exacts approximately $2,160,000.00 per year from foreign insurance companies (R. 43).

SPECIFICATION OF ERRORS

Assignments of Error 1 to 11, both inclusive (R. 70-74), are here relied upon. They are naturally grouped as follows:

(a) Sections 1 and 2 of Article XIX of the Constitution of the State of Oklahoma, Section 10478, Oklahoma Statutes 1931, and 36 Oklahoma Statutes 1941, Section 104, and each of them, are unconstitutional in that they deny to appellant the equal protection of the laws and take its property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Constitution of the United States.

(b) The enforcement and collection of the tax by the Insurance Commissioner of the State of Oklahoma, purporting to act pursuant to the provisions of the aforementioned laws, is unconstitutional upon the same grounds.

(c) The judgment and the opinion of the Supreme Court of Oklahoma are in error in holding the aforementioned laws valid and the enforcement of the tax here for review valid, notwithstanding the provisions of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

I.

This Court will accept the operation of the tax law and its characterization as determined by the state court, but will determine for itself whether, in the light of such operation, its effect would involve a violation of the Federal Constitution.

(a) Excise Taxes Which Include Privilege, License, Occupation, Business, and Franchise Taxes, Are to Be Distinguished From Admission or License Fees.

(b) Neither the Form in Which the Taxing Scheme Is Cast, Nor the Privilege Tax Characterization Put Upon It Is Controlling.

(c) This Court Regards Substance Rather Than Name of Form, and Finds the Controlling Test in the Operation and Effect of the Tax.

II.

If the gross premium tax infringes upon guaranties under the Fourteenth Amendment to the Federal Constitution, it may not be validated by claims of waiver under Section 1, Article XIX of the Oklahoma Constitution, upon entry into the State, or by claim of sovereign right to exclude foreign corporations.

(a) The Conditions Imposed by Section 1, Article XIX of the Oklahoma Constitution (*Appendix, p. i*) Violate the Federal Constitution Insofar as It Requires Appellant to Submit to a Tax Law That Is Repugnant to the Federal Constitution.

(b) A Foreign Corporation Entering the State by Permission Is Not Obligated to Comply With, or Estopped From Objecting to, a Tax Law Which Conflicts With the Federal Constitution.

III.

The operation of the Oklahoma Gross Premium Tax Statutes effectively reveals that the exaction in question is a tax, and that such exaction is neither a fee nor condition precedent to the permissive entry of foreign insurance companies into the State.

(a) The Gross Premium Tax in Question Operates and Applies Each Year After the Issuance of the Annual License. It Is a Tax for the Past and Not a Fee for the Future. (See Analysis of Act in Argument.)

(b) A Foreign Insurance Company Is Admitted Into the State and Put on a Level With Domestic Insurance Companies by Compliance With Valid Conditions Precedent.

(c) The Valid Conditions Precedent in the Hanover Case Required That Before Admission Into Illinois the Foreign Insurance Company Have Sufficient Capital; Appoint a Service Agent; File Its Charter and Statements of Its Business and Financial Condition; Deposit Certain Securities, and Pay the Tax Required by the 1919 Gross Premium Tax Law of Illinois. (See Analysis in Argument.)

(d) The Oklahoma Supreme Court, in Attempting to Distinguish the Hanover Case From the Case at Bar, Erroneously Held That the 1919 Law of Illinois and the Oklahoma Gross Premium Tax Law Are Almost the Same. The Said Illinois Law Exacts a Fee Before Admission While the Oklahoma Law Exacts a Tax After Admission. (See Analysis in Argument.)

(e) The Valid Conditions Precedent Under the Laws of Oklahoma Require That Before Admission a Foreign Insurance Company Pay the Annual License Fee ($25.00 to $200.00, Depending on Class of Company).

and Comply With Certain Regulatory Requirements Similar to Those Outlined in the Hanover Case. (See Analysis in Argument.)

(f) A Foreign Corporation Licensed for One Year at a Time Cannot Be Required to Show Past Compliance With a Tax Law That Violates the Federal Constitution, Under the Guise That the Payment of the Tax Is a Condition Precedent to the Renewal of Its Annual License.

(g) The Case of *Fire Association of Philadelphia* v. *New York*, 119 U. S. 110, 30 L. Ed. 342, Cited and Approved by the Oklahoma Supreme Court, Involved a License Fee Paid for the Future.

(h) The State May Not Relieve Itself From Granting the Equal Protection of the Laws by Providing That Failure to Comply With a Tax Law During the Period or at the End of the Period for Which the License Runs Justifies a Revocation of the License or a Refusal to Grant a Renewal License.

IV.

The Gross Premium Tax Laws of Oklahoma deny to appellant the equal protection of the laws in violation of the Fourteenth Amendment. Payment of the invalid tax imposed by such laws cannot be made a valid condition precedent to the issuance of renewal licenses.

(a) The First Two Paragraphs of Section 2, Article XIX of the Oklahoma Constitution (*Appendix*, p. i) Prescribe the Fee to Be Paid Before Admission or Issuance of the Annual License. The Last Paragraph of That Section Applies the Gross Premium Tax After Admission and Issuance of Each Annual License.

(b) The Tax Law in Question, Like the Invalid Net Receipts Tax Law of Illinois in the Hanover Case, Applies After Foreign Insurance Companies Are Received Into the State, and Must Therefore Conform to the Equal Protection Clause of the Fourteenth Amendment.

(c) That the Oklahoma Gross Premium Tax in Question Is for Revenue Purposes and Discriminates Heavily Against Foreign Insurance Companies Is Unquestioned.

(d) The Tax Law in Question Denies to Appellant the Equal Protection of the Laws in Violation of the Fourteenth Amendment and, Being an Invalid Tax, Is Likewise Invalid as a Fee or Condition Precedent to the Issuance of Renewal Licenses.

ARGUMENT

I.

This Court will accept the operation of the tax law and its characterization as determined by the state court, but will determine for itself whether, in the light of such operation, its effect would involve a violation of the Federal Constitution.

The leading case on the questions presented in the case at bar is *Hanover Fire Ins. Co.* v. *Harding* (reported in L. Ed. as *Hanover Fire Ins. Co.* v. *Carr*), 272 U. S. 494, 71 L. Ed. 372, 47 Sup. Ct. 179 (1926). It is thoroughly germane and in point, and is supported by many decisions of this Court which are therein cited. For convenience and brevity in repeated references to that case we shall hereinafter refer to it as the "*Hanover case*" and the applicable portions of the opinion therein by page numbers in 272 U. S.

The Oklahoma Supreme Court has ruled that the tax in question is clearly a privilege tax (R. 59).

Whether the term used is "occupation tax," "business tax," "privilege tax," "license tax," or "franchise tax," it remains an excise charged for the privilege of doing business and all of such taxes are of the same essential character. Witness Cooley on Taxation:

> "Taxes are either (1) capitation or poll taxes, (2) taxes on property, or (3) excise taxes. The first two are generally classified as direct taxes and the third as indirect taxes. Another classification is as (a) specific and (b) ad valorem." *Cooley Taxation* (4th ed.), Vol. 1, page 118.
>
> "An excise tax, using the term in its broad meaning as opposed to a property tax, includes taxes sometimes designated by statutes or referred to as privilege taxes, license taxes, occupation taxes, and business taxes. There is no clear line of demarcation between so-called 'license,' 'occupation,' and 'privilege' taxes. In the case of corporations such taxes are often referred to as franchise taxes.
>
> "Sometimes the term 'license fee' is used to distinguish an exercise of the police power from an exercise of the taxing power referred to as a 'license tax'." *Cooley Taxation* (4th ed.), Vol. 1, pp. 129-131.

Whether the exaction is a valid excise tax, as distinguished from a valid license or admission fee, involves the inquiry regarding the operation and effect of the tax law, which we shall discuss later.

In the *Hanover case* this Court had for consideration the constitutionality of a statute of Illinois which imposed a tax on the net receipts of a class of foreign insurance companies. Competing domestic insurance companies paid no tax on net receipts. The Supreme Court of Illinois for many years had held that the net receipts tax was a tax on personal property. In practice net receipts had been treated as personal property and their assessment was by equalization and debasement reduced from full value as all other personal property to 30% of fair cash value. In 1921 and again in 1923 the Supreme Court of Illinois held that said net receipts tax was a tax on the business of insurance and that it was not a tax on personal property, which was subject to debasement. *People ex rel Chicago* v. *Kent*, 300 Ill. 324, 133 N. E. 276; *People ex rel Chicago* v. *Barrett*, 309 Ill. 53, 139 N. E. 903. In 1925 the Supreme Court of Illinois ruled that said net receipts tax was a tax on the amount of business done, and for the privilege of continuing in such business, and was not to be distinguished from a privilege tax. It sustained the assessment of net receipts on the basis of 100% thereof. *Hanover Fire Ins. Co.* v. *Carr*, 317 Ill. 366, 148 N. E. 23. Upon writ of error to review the decree in the latter case, this Court referred to the tax as an occupation tax (p. 516). In holding that the tax law denied the equal protection of the laws, this Court declined to permit the form of the tax or its characterization by the state court to control in the determination of the Federal question, and said (pp. 509-510):

"It is true that the interpretation put upon such a tax law of a state by its Supreme Court is binding upon this Court as to its meaning, but it is not true that this Court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal Constitution. As said by this Court in *St. Louis-Southwestern R. Co. v. Arkansas*, 235 U. S. 350, at page 362, 59 L. Ed. 265, 271, 35 Sup Ct. Rep. 99, where the question was whether a tax law violated the equal protection clause of the Fourteenth Amendment:

"'Upon the mere question of construction we are, of course, concluded by the decision of the state court of last resort. But when the question is whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the state court. We must regard the substance rather than the form, and the controlling test is to be found in the operation and effect of the law as applied and enforced by the state'."

That view has been followed consistently. *Staraasli v. Minnesota*, 283 U. S. 57, 75 L. Ed. 839; *City of Greenville v. W. G. Query*, 286 U. S. 472, 476, 76 L. Ed. 1232, 1236.

Following the decision of this Court in the *Hanover* case, the Supreme Court of Illinois receded from the position that it had taken since 1921, namely, that the said tax was an occupation or privilege tax, and returned to its original ruling that the tax was a property tax. *Hanover Fire Ins. Co. v. Harding*, 327 Ill. 590, 601, 158 N. E. 849;

People v. *Franklin Nat. Ins. Co.*, 343 Ill. 336, 175 N. E. 431. Thereafter, in *Concordia Fire Ins. Co.* v. *Illinois*, 292 U. S. 535, 78 L. Ed. 1411, the assessing officers and the Supreme Court of Illinois applied said tax law of Illinois as subjecting the net receipts of a foreign fire insurance company, by reason of being such, to a tax burden of 66⅔% greater than that laid on other personal property. This Court in there holding that said law as so applied violated the equal protection clause of the Federal Constitution said (p. 545):

> "It is essentially the same character of arbitrary and prejudicial discrimination that was condemned as a denial of the equal protection of the laws in *Hanover F. Ins. Co.* v. *Harding (Hanover F. Ins. Co.* v. *Carr)*."

And (p. 552):

> "This court did not hold in *Hanover F. Ins. Co.* v. *Harding (Hanover F. Ins. Co.* v. *Carr)* * * * that if the tax was an excise, it would be void for that reason, though the assessment were to be debased. All that was held was that calling it an excise would not save it if the benefit of debasement was withheld in a discriminatory way. By the same token, calling it a property tax does not condemn it if debasement is allowed."

The foregoing cases therefore reveal that the net receipts tax law of Illinois had been characterized formerly as a property tax, later as a privilege or occupation tax (such was its name when the *Hanover case* was decided), and finally as a property tax. The provisions of said law during the entire period remained the same. This Court

in the *Hanover* and *Concordia cases* accepted the characterization placed on said law by the Illinois Supreme Court, but determined the question of its validity from the manner in which it operated and was applied.

In the case of *Galveston H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 227, 52 L. Ed. 1031, 1037, which involved the validity of a Texas statute imposing an annual tax "equal to 1% of its gross receipts" on each railroad lying wholly within that state, the railroad contended that the tax was a burden on interstate commerce, and invalid, so far as it was based on or was measured by receipts derived from interstate transportation. That view was sustained. The Court said:

> "Neither the state court nor the legislature by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect."

Followed in *Choctaw O. & G. R. Co.* v. *Harrison*, 235 U. S. 292, 298, 59 L. Ed. 234, 237.

In *St. Louis Cotton Compress Co.* v. *Arkansas*, 260 U. S. 346, 348, 67 L. Ed. 297, 299, a gross premium tax law of Arkansas characterized as an occupation tax was questioned and this Court, in testing the question of its validity, said:

> "The name given by the state to the imposition is not conclusive."

To the same effect see *Quaker City Cab Co. v. Commonwealth of Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927; *James v. Dravo Contracting Co.*, 302 U. S. 134, 157, 158, 82 L. Ed. 155, 171.

The effect of the foregoing cases is to impose upon this Court the duty of determining whether the Oklahoma gross premium tax, in the light of its operation as determined by the Oklahoma Supreme Court, is in effect a license fee or regulatory measure outside the scope of the Fourteenth Amendment, or one for revenue that must conform to the equal protection clause of the Fourteenth Amendment. In so doing, this Court is not bound by mere forms, nor will it be misled by mere pretenses. It is at liberty, and indeed is under a solemn duty, to look at the substance of things, whenever it enters upon the inquiry whether the statutes in question here violate the Federal Constitution.

II.

If the gross premium tax infringes upon guaranties under the Fourteenth Amendment to the Federal Constitution, it may not be validated by claims of waiver under Section 1, Article XIX of the Oklahoma Constitution, upon entry into the State, or by claim of sovereign right to exclude foreign corporations.

Section 1, Article XIX of the Oklahoma Constitution provides that no foreign insurance company shall be granted a license until it shall have agreed to pay all taxes and fees as may at any time be imposed, and provides that a refusal to pay such taxes or fees shall work a forfeiture of such license (*Appendix, p. 1*).

The Supreme Court of Oklahoma in construing that provision of the Oklahoma Constitution (R. 58-59) holds that the premium tax imposed by the latter part of Section 2, Article XIX of the Constitution of Oklahoma (*Appendix, p. ii*) and the premium tax imposed by Section 10478, Oklahoma Statutes 1931 (Section 22, General Insurance Act of 1909—*Appendix, p. viii*) and the 1941 Amendment, which changed the rate of the tax to 4% (Section 1, Oklahoma Gross Premium Tax Act of 1941—*Appendix, p. xii*), is the tax imposed by law referred to in Section 1, Article XIX of the Oklahoma Constitution. In Syllabus No. 7 of the opinion (R. 49) said Court holds that the imposition of the gross premium tax on foreign insurance companies as provided by said sections of the Oklahoma Constitution and statutes does not violate the Fourteenth Amendment of the Federal Constitution.

In the *Hanover case*, after reference was made to the decisions holding that a State may exclude foreign corporations arbitrarily, or impose such conditions as it will upon their engaging in business within its jurisdiction, this Court said (p. 507):

> "But there is a very important qualification to this power of the state, the recognition and enforcement of which are shown in a number of decisions of recent years. That qualification is that the state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the constitution of the United States may be infringed."

That qualification to the power of the State as announced in the *Hanover case* is illustrated in many cases which are cited and classified in that case (pp. 507, 508), viz: In cases involving the commerce clause; in cases involving the constitutional right of a foreign corporation to remove suits to the Federal courts; in cases involving a tax law subjecting foreign corporations to a tax on their property within as well as without the State; and in cases where a tax law denies to a foreign corporation the equal protection of the laws.

That pronouncement in the *Hanover case* has been followed consistently in many decisions of this Court wherein it is further established that a foreign corporation seeking and obtaining permission to do business in a state does not thereby become obligated to comply with, or estopped from objecting to, any provision in the state statutes which conflicts with the Constitution of the United States.

—*Power Mfg. Co.* v. *Saunders*, 274 U. S. 490, 496, 497, 71 L. Ed. 1165, 1169;

Quaker City Cab Co. v. *Commonwealth of Pennsylvania*, 277 U. S. 389, 400, 401, 72 L. Ed. 927, 929;

Foster-Fountain Packing Co. v. *Haydel*, 278 U. S. 1, 13, 73 L. Ed. 147, 154;

United States v. *Chicago, M. St. P. & P. Ry. Co.*, 282 U. S. 311, 328, 75 L. Ed. 359, 366;

Washington ex rel Bond & G. & T. v. *Superior Court*, 289 U. S. 361, 365, 77 L. Ed. 1256, 1260;

Phillips Petroleum Co. v. *Jenkins*, 297 U. S. 629, 634, 80 L. Ed. 943, 947;

Bacardi Corp. v. *Domenech*, 311 U. S. 150, 166, 85 L. Ed. 98, 108.

It is made clear by the foregoing authorities that if the statutes of Oklahoma imposing a tax on gross premiums of foreign insurance companies contravene the Federal Constitution, Section 1, Article XIX of the Constitution of Oklahoma, as construed and applied by the Oklahoma Supreme Court, is likewise invalid.

III.

The operation of the Oklahoma Gross Premium Tax Statutes effectively reveals that the exaction in question is a tax, and that such exaction is neither a fee nor condition precedent to the permissive entry of foreign insurance companies into the State.

Analysis of the Operation of the Oklahoma Gross Premium Tax

It is made clear by the opinion of the Oklahoma Supreme Court (see our statement of the case) that when a foreign insurance company enters the State and is permitted to do business for the first time, the license issued to it expires on the last day of February following such entry; that business must be done and premiums collected in the State before the premium tax can apply; that the tax applies to business done each year after the annual license is issued; that the tax is paid at the end of each license year for the annual privilege that expires at the time of such payment. The foreign insurance company is

not relieved from its obligation to pay the tax if it withdraws from the State at the end of its first year or any subsequent license year. The obligation to pay the tax exists whether such corporation withdraws from the State when the tax is due or renews its annual license. It is a tax for the past and is not a license fee for the future. If such corporation on payment of the tax does not withdraw from the State but desires to renew its license, it must then as a condition precedent to the issuance of a renewal license show that it has paid the tax.

(a) A Foreign Insurance Company Is Admitted Into the State and Put on a Level with Domestic Insurance Companies by Compliance with Valid Conditions Precedent.

We shall first give consideration to our contention that, by reason of the manner in which the statutes in question operate and apply, the exaction thereunder is a tax which must conform to the equal protection clause of the Federal Constitution. We shall then show that an *invalid tax* cannot be converted into a *valid license fee* or condition precedent to the issuance of renewal licenses.

Valid Conditions Precedent in the "Hanover Case."

The *Hanover case* reveals that by Section 22 and other sections of the Act of 1869 of the State of Illinois (of which Section 30 there in question was a part), before admitting foreign insurance companies into the State, required that such companies have a prescribed amount of capital; ap-

point a service agent in the State; file a copy of its charter and a statement of its financial condition and last annual report; and deposit certain securities within the State. It further required annual certificates or licenses to transact business and subjected anyone violating the act to a penalty not exceeding $500.00. It required such companies to make annual reports of their condition and affairs and the Insurance Superintendent was given authority to investigate the affairs of such companies and, if unsound, to close up the business of the company (pp. 502-503).

It is further revealed in that case that Illinois in 1919 imposed upon foreign insurance companies a 2% gross premium tax which was complied with, while the net receipts tax under Section 30 of the Illinois Act of 1869 was questioned. The complainant foreign insurance company insisted that under the previous practice and proper construction of Section 30 as a property tax with due equalization and debasement, the tax assessed upon its net receipts should have been $2,155.24, if anything, rather than $7,184.18. The Supreme Court of Illinois affirmed the decree of the Superior Court, which denied equalization and debasement of the net receipts as personal property (pp. 503-505).

This Court reversed the judgment of the Illinois Supreme Court and held that the net receipts tax as construed and applied by the Illinois Supreme Court was a heavy discrimination in favor of domestic insurance companies and denied foreign insurance companies of the same class the equal protection of the laws (p. 516).

This Court pointed out in that case that in deciding the question whether a tax imposed by a state deprives a party of rights secured by the Federal Constitution, "the controlling test is to be found in the operation and effect of the law as applied and enforced by the state" (pp. 509-510); that an "admission fee" which a foreign corporation must pay to become a quasi citizen does not come within the inhibitions of the Fourteenth Amendment, "but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind" (p. 511). Then this Court, after reviewing the provisions of the Illinois law that were required to be complied with before the foreign insurance company there involved received its license, said:

> "By compliance with the valid conditions precedent, the foreign insurance company is put on a level with all other insurance companies of the same kind, domestic or foreign within the state, and tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the Fourteenth Amendment" (p. 515).

The Illinois net receipts tax (Section 30) which was there held invalid operated and applied after the issuance of the license to the foreign corporation there involved, and as said by this Court:

> "It is plain that compliance with Section 30 is not a condition precedent to permission to do business

in Illinois. The State Supreme Court concedes this, * * *" (p. 512).

That statement was made after the Court had dealt with the requirements hereinabove set forth constituting conditions precedent under the Illinois law, and as to such requirements the Court said:

> "The complainant insurance company complied with the requirements of Section 22 and other unrepealed sections of the Act of 1869 and paid the 2 per cent tax on its premiums received as provided by the Act of 1919" (p. 504).

The Illinois gross premium tax act of 1919 was not questioned in the *Hanover case*. Brief reference to that law was made in the opinion of this Court and its text is not there revealed, although its text was set forth in the briefs filed in that case. The operation and effect of that law obviously was understood by this Court and all counsel involved in the case. But without careful consideration of the manner in which said law operates, that case may be erroneously interpreted as upholding gross premuim tax laws irrespective of the manner in which they operate. That error is found in the opinion of the Oklahoma Supreme Court.

Whether a tax relates to net receipts, gross premiums, or any other subject of taxation, the controlling test of its validity is to be found in its operation and effect as applied and enforced by the State. That rule was applied to a

vehicle registration tax in *Storaasli* v. *Minnesota*, 283 U. S. 57, 75 L. Ed. 839. In *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 82 L. Ed. 155, this Court said (pp. 157-158):

> "As we have observed, the fact that the tax in the present case is laid upon the gross receipts, instead of net earnings, is not a controlling distinction."

In the opinion of the Oklahoma Supreme Court it was said that the *Hanover case* "may well be distinguished from the case at bar as to the tax there held to be invalid" (R. 60). The Oklahoma Supreme Court further pointed out that there was in the *Hanover case* no contention as to the validity of the Illinois gross premium tax law of 1919 (R. 60), and then said:

> "The 2% gross premium tax levied under the law in Illinois, almost the same as the Oklahoma law as construed by the department and the court below as a privilege tax or license tax, was upheld" (R. 62).

The Oklahoma Supreme Court further held that:

> "It is not essential that a privilege tax be paid before the exercise of the privilege. Payment may precede or follow the exercise of the privilege, depending upon which system the Legislature chooses to adopt" (R. 57).

We take no issue with the holding that a privilege tax may be paid after the exercise of the privilege, provided it does not violate the guaranties under the Fourteenth Amendment. We neither argue nor infer that the tax law in question is invalid because it is a privilege tax. The character of the tax is immaterial. The controlling test is to be found in the operation and effect of the law

as applied and enforced by the State. But if a privilege tax operates and applies after admission of a foreign corporation into the State, as did the net receipts tax in the *Hanover case*, it must conform to the equal protection clause of the Federal Constitution.

The Oklahoma Supreme Court apparently arrives at the conclusion that the Illinois gross premium tax law of 1919 and the Oklahoma gross premium tax statutes are almost the same without examining the text of the Illinois law or giving any consideration to the manner in which it operates. The only similarity between the two laws is that both are characterized as privilege tax laws and both relate to gross premiums. They are radically different in the manner in which they operate.

Analysis of the Operation of the 1919 Gross Premium Tax Law of Illinois.

The pertinent provisions of the said 1919 law of Illinois are shown on pages xiv-xv of the *Appendix*. By Section 6 thereof the statutory license year commenced on the first day of July of each year, and ended on the 30th day of June next thereafter. By Section 13 thereof, a foreign insurance company applying for admission into Illinois for the first time, was required, *before admission*, to pay a sum made certain by the formula prescribed. It could not be measured by gross premiums and be paid *before* the company was admitted for the first time. It was measured at the rate of $300.00 per annum for as many months as would elapse between the date of admission

and the end of the statutory licence year. Such payment was required for the license period commencing with the date of admission and ending at the expiration of the statutory license year. By Section 1 thereof, the annual 2% premium tax was measured on the gross amount of premiums received during the preceding calendar year. By Section 6 thereof said premium tax was due on the first day of July in each year, when the statutory license year commenced, and such payment was required for the statutory license year commencing on the first day of July in which it was due. Therefore, *before* a foreign company was first admitted into Illinois it paid a sum certain for the privilege of doing business during the fraction of the statutory license year that *followed* the payment of the tax and the issuance of the license. When it renewed its license it was then for the first time required to pay a tax measured on premiums previously collected in the State, for the privilege of doing business during the statutory license year *following* the issuance of the renewal. In both instances the payment was exacted for the license period that *followed* the issuance of the license. The tax did not apply to business done *after* the issuance of the annual license, but the law required all payments exacted thereunder to be made *before* the issuance of the license. If the foreign corporation withdrew from Illinois at the end of any license year in which it was issued a license, it had previously paid for the privilege enjoyed and owed no tax under the law. Such exaction, unlike the Oklahoma gross premium tax, is clearly a fee paid for the *future* and not a

tax paid for the privilege of having done business in the past. The exaction under the 1919 law of Illinois is technically a "license fee" or "admission fee," as distinguished from a "privilege," "occupation," "business," or "license" tax. That distinction is very material in determining whether a tax law violates the Federal Constitution. The license or admission fee operates and applies before the foreign company is admitted into the State and, as stated in the *Hanover case, supra,* any inequalities as between foreign and domestic companies in that regard do not come within the inhibitions of the Fourteenth Amendment.

The distinction is pointed out in *Atlantic Refg. Co. v. Virginia,* 302 U. S. 22, 32, 82 L. Ed. 24, 31, where it was said:

> "The exaction, although called in some of those cases a filing fee, was in each case strictly a tax; for it was imposed after the admittance of the corporation into the State."

It was made plain in the *Hanover case* that compliance with Section 30 was not a condition precedent to permission to do business in Illinois, because it applied after the admission of foreign insurance companies into the State. The Supreme Court of Illinois said, as quoted by the United States Supreme Court:

> "Compensation for that privilege should be based on the benefits actually derived from the business done under such privilege and such compensation must necessarily be assessed in some manner after the business is done and the benefits thereof received.

> Section 30 provides the method by which the amount of this compensation shall be determined and assessed" (p. 512).

It is obvious that both the Supreme Court of Illinois and the Supreme Court of the United States in the *Hanover case* properly conceived the elements involved in the requirements of the laws of Illinois constituting conditions precedent to entry into the State. They agreed on that question and their understanding in that regard is in accord with the general definition of the term "condition precedent":

> "At the common law, a condition is precedent when its fulfillment must precede the vesting of an estate or the accruing of a right. * * *." Webster's New International Dictionary, Second Edition, p. 556.

Valid Conditions Precedent Under Oklahoma Law.

Domestic and foreign insurance companies doing business in Oklahoma are subject to requirements relating to the business carried on; examinations and audits; revocation of licenses for non-compliance with the laws; appointment, liability, and punishment of agents; and maintenance of a business office in the State, as set forth in the General Insurance Act of 1909 (*Appendix, p. iii*). Those provisions of the laws of Oklahoma regulating the business of insurance are of the same type as provided by Section 22 and other sections of the original Illinois Act of 1869 as outlined in the *Hanover case* (pp. 502-503).

Domestic insurance companies of Oklahoma, as well as foreign insurance companies admitted into Oklahoma,

are required to file annual statements and to obtain annual licenses to do business as provided by Section 21 of the General Insurance Act of 1909 (*Appendix, p. vii*). Those regulations are not conditions of admission. Therefore, the requirement that annual licenses be issued both to domestic and foreign insurance companies does not set the stage at which foreign corporations are put on a level with domestic insurance companies. That stage is set by other requirements of the laws of Oklahoma hereinafter discussed.

Applying the rules announced in the *Hanover case*, the valid conditions precedent under the Oklahoma laws are the requirements that operate, apply, and are capable of being fulfilled before the admission of, or the issuance of a license to, a foreign insurance company. They are set forth in our statement of the case, and are of the same general nature as the conditions precedent outlined in the *Hanover case*. When such requirements are complied with, the Insurance Commissioner is directed under Section 21 of the General Insurance Act of 1909 (*Appendix, p. vii*) to issue the license.

(b) A Foreign Corporation Licensed for One Year at a Time Cannot Be Required to Show Past Compliance with a Tax Law that Violates the Federal Constitution, Under the Guise that the Payment of the Tax Is a Condition Precedent to the Renewal of its Annual License.

A means of circumventing the guaranties of the Federal Constitution would be employed in cases like the *Hanover case* and the one at bar, wherein the State issues

licenses to foreign companies for only one year at a time, if the State were permitted to enforce, under the guise of a condition precedent to the renewal of the annual license, a discriminatory tax based on benefits actually derived from business done and which must necessarily be assessed in some manner after business is done. The State in so manipulating the tax would be making past compliance with a tax law which violates the Fourteenth Amendment a condition precedent to a renewal of the license. The guaranties of the Federal Constitution would thus be manipulated out of existence, as pointed out in the language of this Court in the case of *Marion L. Frost et al.* v. *Railroad Comm. of the State of California*, 271 U. S. 583, 70 L. Ed. 1101 (decided June 7, 1926, and cited in the *Hanover case)* where on pages 593-594 it was said:

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizens of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is in-

conceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

This Court pointed out in the *Hanover case* that the Supreme Court of Illinois erroneously held that the complainant foreign insurance company was required to pay the net receipts tax in order to maintain and retain its right to do business in the State and to obtain a new license (pp. 512-515). This presents the questions: Whether an unequal and discriminatory tax which applies to business done by a foreign insurance company after it receives its license to do business in the State may be employed to debar it from continuing in business within the State? Whether an unequal and discriminatory tax which applies to business done by a foreign insurance company after its admission into the State may be employed as a condition precedent to a renewal of the annual license?

(The Philadelphia Fire Association Case)

The case of *Fire Association of Philadelphia* v. *New York* (1886), 119 U. S. 110, 30 L. Ed. 342, which was cited with approval in the opinion of the Oklahoma Supreme Court herein (R. 57), involved a retaliatory law of New York. The law was enacted in 1865 and as amended in 1875 provided that whenever the laws of other states should require any payment of New York corporations for taxes, license fees, etc., greater than required from similar companies of other states by the laws of New York, then all

companies of such states doing business in New York should pay to New York an equal amount for such taxes, license fees, etc.

Pennsylvania, by an act passed April 4, 1873, prohibited a foreign insurance company from doing business in Pennsylvania until it was granted a certificate of authority. It required such corporations that were authorized to transact business in Pennsylvania to report in January of each year the premiums received by such companies during the preceding calendar year and to pay a percentage tax thereon. It further provided:

> "* * * and the Commissioner shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the state treasury."

The defendant, Pennsylvania Insurance Company, received a certificate of authority to do business in New York in 1872 and from year to year thereafter until 1882. In the year 1881 the Pennsylvania company received in the State of New York premiums in an amount specified. The State of New York brought an action against the Pennsylvania company to recover the percentage tax on the premiums received by the Pennsylvania company during 1881. The State of New York contended that the Pennsylvania company should pay *as a tax* for the year 1881 the amount claimed. The Pennsylvania company claimed the benefit of the Fourteenth Amendment and contended that being in the State of New York by permission continuously from

1872 to 1882, the State of New York imposed on it while there in 1882 an unequal and unlawful burden. Neither contention was sustained. The Court in the opinion said:

> "This Pennsylvania Corporation came into the State of New York to do business, by the consent of the State, under this Act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State for any given year under such license, and subject to the conditions prescribed by statute. The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, *for the future*, and to impose as a condition the payment of a new tax, or a further tax, *as a license fee*."

We have hereinabove shown that the exaction under the 1919 gross premium tax law of Illinois operates as a license fee for the future, while the Oklahoma gross premium tax laws in question here and the net receipts tax law of Illinois in question in the *Hanover case* operate as a tax for the privilege previously exercised.

The Fourteenth Amendment to the Constitution of the United States went into effect in July, 1868, only eighteen years before the *Philadelphia Fire Association* case was decided. The Court in that case relied primarily upon the earlier decisions in the cases of *Paul* v. *Virginia*, 8 Wall. 168, 19 L. Ed. 357, and *Ducat* v. *Chicago*, 10 Wall. 410, 19 L. Ed. 972.

The case of *Paul* v. *Virginia* was decided November 1, 1869, approximately sixteen months after the Fourteenth Amendment became effective. *Ducat* v. *Chicago* was de-

cided January 9, 1871, approximately two and one-half years after the Fourteenth Amendment became effective. *Paul* v. *Virginia* did not involve the Fourteenth Amendment, but involved the privilege and immunities clause of of Section 2, Article IV, and the commerce clause of Section 8, Article I, of the Constitution. *Ducat* v. *Chicago,* as said in *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, 54 L. Ed. 536:

> "* * * arose before the Fourteenth Amendment had become a part of the Federal Constitution, and that no reference is made in the opinion of the court to the Fourteenth Amendment, although the case was decided after that amendment went into effect."

Mr. Justice Harlan filed a strong dissenting opinion in the *Fire Association of Philadelphia* case in which he discussed *Paul* v. *Virginia* and *Ducat* v. *Chicago,* but pointed aut that the right of the states to admit foreign corporations upon such terms and conditions as they may think proper to impose is subject to the important qualification that was announced in the earlier case of *Lafayette Insurance Co.* v. *French,* 18 How. 404, 407, 15 L. Ed. 451, 453, *viz.:* Provided the terms and conditions so prescribed are not repugnant to the Constitution of the United States. That qualification, as pointed out in the dissenting opinion, had been applied in *Insurance Co.* v. *Morse,* 20 Wall. 445, 22 L. Ed. 365, to invalidate a statute of Wisconsin whereby foreign corporations before admission into the State were required to agree that suits brought against them in the state courts would not be removed to the Federal courts. The dissenting opinion further pointed out that in the light of the guaranties of the Federal Constitution there existed

no difference between the invalid Wisconsin statute involved in the *Insurance Co.* v. *Morse* case and the New York statute involved in *Fire Association of Philadelphia* v. *New York.*

(The Greene Case)

In *Southern Railway Co.* v. *Greene,* 216 U. S. 400, 54 L. Ed. 536 (1910), this Court held, quoting from the syllabus:

> "A foreign railway corporation which has come into the state in compliance with its laws, and has therein acquired property of a fixed and permanent nature, upon which it has paid all taxes levied by the state, is a person within the jurisdiction of the state, and, as such, is protected by the equal protection of the laws clause of U. S. Const., 14th Amend., against the imposition, under 1 Ala. Code. 1907, secs. 2391-2400, of an additional franchise tax for the privilege of doing business within the state, where no such tax is imposed upon domestic corporations carrying on a precisely similar business."

In the opinion in that case the Court discussed the case of *Ducat* v. *Chicago, supra,* and showed that it arose before the Fourteenth Amendment became effective. It also pointed out that the tax questioned in *Fire Association of Philadelphia* v. *New York, supra,* was levied for the future, and then said:

> "* * * we have adverted to these cases with a view of showing that the precise point involved herein is not concluded by any of them. * * * We have here a foreign corporation within a state, in compliance with

the laws of the state, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method, not employed as to domestic corporations of the same kind, carrying on a precisely similar business."

(The "Hanover Case")

In 1926, and sixteen years after this Court had found that the *Greene* case was not governed by *Ducat* v. *Chicago, supra,* and *Fire Association of Philadelphia* v. *New York, supra,* it again was asked to apply those decisions in the *Hanover case.* The *Hanover case* was decided some 58 years after the Fourteenth Amendment went into effect, and the Court was mindful of the means employed to circumvent the guaranties for equal protection of the laws as to foreign corporations licensed for one year at a time.

The defendant in error in the *Hanover case* cited and relied upon *Paul* v. *Virginia, Ducat* v. *Chicago,* and *Fire Association of Philadelphia* v. *New York* (see p. 375 of 71 L. Ed.). The unanimous opinion in the *Hanover case* expressly referred to *Paul* v. *Virginia* and *Ducat* v. *Chicago* among other cases to the same effect. It pointed out that by later decisions there had been established an important qualification to the rule announced by the former decisions, in that the State may not exact as a condition of foreign corporations engaging in business within its limits, that the rights secured to such corporations by the Constitution of the United States may be infringed. That qualification, according to the opinion in the *Hanover case,* had

been applied to different classes of cases as described in the opinion, and the Court then proceeded to apply it in the *Hanover case* where a tax or license law operated to deny to foreign corporations licensed for one year at a time the equal protection of the laws (pp. 507-508).

In the *Hanover case* this Court said:

> "In the *Greene* case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens" (p. 509).

In discussing the decision of the Supreme Court of Illinois, this Court in the *Hanover case* further points out that it seemed to be the view of that Court that the constitutional necessity for equal protection of the laws is avoided if the State provides that failure to comply with the law during the period or at the end of the period for which the license runs justifies a revocation of the license pending the period or a refusal to grant a new license for the following year, and then said:

> "* * * We do not think the state may thus relieve itself from granting the equal protection of its laws to a foreign company which has met the conditions precedent to its becoming a *quasi* domestic citizen. Of course at the end of the year for which the license has been granted, the state may in its discretion impose as condition precedent for a renewed license past compliance with its *valid* laws; but that does not enable the State to make past compliance with Section 30 a

condition precedent to a renewal of the license, if as we find that section violates the 14th Amendment, * * *" (p. 514).

The Court then proceeds to discuss and follow the principles announced in the *Greene* case and other cases cited, and to show that where foreign corporations are licensed for only one year at a time a tax cannot be manipulated outside the guaranties of the Fourteenth Amendment by disguising the tax as a condition precedent to renewals of the annual license (pp. 514-515). These principles were again followed by this Court in the case of *Connecticut General Life Ins. Co.* v. *Johnson*, 303 U. S. 77, 79, 80, 82 L. Ed. 673, 677.

The practice of the Insurance Comimssioner of Oklahoma, which is approved by the Oklahoma Supreme Court, in requiring the payment of the gross premium tax in question that becomes due at the end of each current license year for the privilege exercised therein, as a condition precedent to the issuance of renewal licenses, is merely an attempt to avoid the constitutional necessity for equal protection of the laws. The attempt thus to avoid the constitutional guaranties of the Fourteenth Amendment is just as clear in the instant case as it was in the *Hanover case*. It was not permitted in the *Hanover case* and should not be permitted in the instant case.

(The Shaffer Oil & Refining Company Case)

In *Sneed* v. *Shaffer Oil & Refg. Co.* (C. C. A. 8), 35 Fed. (2d) 21 (1929), the Court had under consideration

the Oklahoma statute enacted in 1927, which imposed a license fee upon domestic corporations of 50c for each $1,000.00 of its authorized capital stock, or less, and a license fee upon foreign corporations of $1.00 for each $1,000.00 of their capital invested in their businesses in Oklahoma. The opinion points out that both domestic and foreign corporations were by Section 9947, Comp. Stat. of Okla. 1921, required to procure a license for one year at a time and pay the license fee prescribed, and that the Act of 1927 amended that statute only by prescribing the license fee above set forth; that Section 9952, Comp. Stat. of Okla 1921, defines the license year for which said tax is paid as commencing July 1 and expiring June 30 next thereafter. In holding that the tax there in question denied to foreign corporations the equal protection of the laws under the Fourteenth Amendment the Court quoted from the opinion in the *Hanover case* and the case of *Southern Ry. Co.* v. *Greene*, 216 U. S. 400, 54 L. Ed. 536. Although the *Shaffer Oil & Refining Company* case involved a tax law that applied to foreign corporations licensed in Oklahoma for only one year at a time, it apparently was not considered by the Oklahoma Supreme Court in deciding the instant case.

IV.

The Gross Premium Tax Laws of Oklahoma deny to appellant the equal protection of the laws in violation of the Fourteenth Amendment. Payment of the invalid tax imposed by such laws cannot be made a valid condition precedent to the issuance of renewal licenses.

The first two paragraphs of Section 2, Article XIX of the Oklahoma Constitution (*Appendix, p. i*), require foreign insurance companies to pay the entrance fees therein prescribed. The title "Entrance Fees" refers to those paragraphs. By the last paragraph of the section the premium tax is imposed and the title "Annual Tax" refers to that paragraph, which in content stands alone to the same extent as though it were embodied in a separate section. In grammatical construction it is in no manner dependent upon or related to the preceding two paragraphs dealing with the entrance fee. In fact, its requirements could not operate or apply until after the foreign insurance company had paid the entrance fee provided by the preceding paragraphs, received its license, and carried on its business. Insurance premiums against which the tax paragraph applies could not conceivably be collected in the State until after the foreign insurance company had received its license to do business. It is clear that the State by the provisions contained in the second paragraph of said Section 2 intended that the foreign corporation be admitted into the State and receive its license upon payment of the fee stipulated ($25.00 to $200.00, depending on the type of company), and that thereafter the tax prescribed by the third

paragraph should apply to the business done. That the framers of the Constitution considered the exaction imposed on gross premiums by the last paragraph of said Section 2 as a revenue and tax measure, as distinguished from the fee prescribed by the preceding paragraph, is borne out in Section 3, Article XIX of the Oklahoma Constitution (*Appendix, p. ii*), where certain companies are exempted from "the revenue and tax provisions of this Constitution." Had the Legislature intended to make the exaction operate as a fee or condition precedent rather than as a tax it would have been very simple to make provision therefor as did the 1919 gross premium tax law of Illinois.

The Oklahoma Supreme Court in construing the gross premium statutes here in question cited with approval and quoted from the recent case of *Pacific Mut. Life Ins. Co. v. Hobbs* (1940), 152 Kan. 230, 103 Pac. (2d) 854 (R. 57, 58). Although the Federal question here was not involved in that case, the Kansas Court conceived the distinction which we have hereinabove pointed out between fees paid as a condition precedent and a tax applying after admission. The Kansas Court held:

> "The tax on gross premiums received by foreign insurance companies for business done in the state is an 'excise tax' in the nature of a franchise or privilege tax on the privilege of doing business, and partakes of the nature of a license tax in the sense that payment thereof is required *as a condition precedent to the renewal* of certificates of authority of such companies."

In the opinion the Court pointed out that otherwise:

> "* * * a foreign company coming into the state would be exempt from taxation upon the business done in the first year, if it withdrew at the end of the first year."

In the case of *New York Life Ins. Co.* v. *Board of County Com'rs,* 155 Okla. 247, 9 Pac (2d) 936, the Oklahoma Supreme Court held that the gross premium tax was not in lieu of *ad valorem* taxes and said, quoting from other authorities:

> "'* * * *A tax law imposing a percentage on premiums of a foreign insurance company is a tax on the business,* * * *'"*

We have hereinabove shown that by the manner in which the discriminatory tax in question operates, it is in effect the same type of tax law and possesses the same constitutional defects as found in the net receipts tax law condemned in the *Hanover case,* and to which reference is there made where this Court said:

> "Tax laws made to apply *after* it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and *must conform to the equal protection clause of the 14th Amendment*" (p. 515).

The revenue purpose of the Oklahoma gross premium tax is further shown by Section 2 of the Oklahoma 4% gross premium tax act of 1941, where 50% of the tax col-

lected from fire insurance companies is allocated to the Firemen's Relief and Pension Fund of the State, and the balance to the General Fund of the State (*Appendix, p. xiii*).

It is obviously the view of the Oklahoma Supreme Court that the constitutional necessity for equal protection of the laws is avoided under the Oklahoma gross premium tax law in question by following the theory that failure to pay the tax that is exacted at the end of the annual period for which the license runs justifies a refusal to grant a renewal license for the following license year. If it may be said that this Court in the *Philadelphia Fire Association* case adopted any such theory, it has refused to adhere thereto in later cases, as may be observed from its opinion in the *Hanover case* [our Proposition III(B)].

If the tax here in question were not discriminatory, the State of course could employ the payment thereof as a valid condition precedent to the issuance of renewal licenses, but the *Hanover case*, as we have shown, holds that a state cannot make past compliance with a tax law which violates the Fourteenth Amendment, a condition precedent to a renewal of the license.

CONCLUSION

In conclusion, we desire to point out that if domestic insurance companies of Oklahoma were also subjected to the tax law here in question, or if the rate of the tax imposed solely against foreign insurance companies resulted in foreign and domestic insurance corporations sharing fairly equivalent tax burdens, no complaint would be justified under the equal protection clause of the Fourteenth Amendment.

The *Hanover case* does not permit speculation as to whether the State in dealing with foreign corporations violates the equal protection clause of the Federal Constitution. Disguise and manipulation by the State and its administrators should not be countenanced, for, as stated in the case of *Marion L. Frost et al.* v. *Railroad Comm. of the State of California, supra,* the guaranties of the Federal Constitution could in that manner be manipulated out of existence.

The tax law in question is a form of unconstitutional discrimination, the vicious nature of which was sensed fully by Mr. Justice BRADLEY in the minority opinion in *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148 (such minority opinion expressing the view which was later adopted by this Court). In that case Mr. Justice BRADLEY says:

> "The conditions of society and the modes of doing business in this country are such that a large part of its transactions is conducted through the agency of

corporations. This is especially true with regard to the business of banking, insurance and transportation. Individuals cannot safely engage in enterprises of this sort, requiring large capital. They can only be successfully carried out by corporations, in which individuals may safely join their small contributions without endangering their entire fortunes. To shut these institutions out of neighboring states would not only cripple their energies, but would deprive the people of those states of the benefits of their enterprise. The business of insurance, particularly, can only be carried on with entire safety by scattering the risks over large areas of territory, so as to secure the benefits of the most extended average. The needs of the country require that corporations, at least those of a commercial or financial character, should be able to transact business in different states. If these states can, at will, deprive them of the right to resort to the courts of the United States, then, in large portions of the country, the Government and laws of the United States may be nullified and rendered inoperative with regard to a large class of transactions constitutionally belonging to their jurisdiction.

"The whole thing, however free from intentional disloyalty, is derogatory to that mutual comity and respect which ought to prevail between the State and General Governments, and ought to meet the condemnation of the courts whenever brought within their proper cognizance."

By following the same line of reasoning employed in the above quotation from the opinion in *Doyle* v. *Continental Insurance Co., supra*, it may be said that if the states can limit the period of admission of foreign insurance corporations to one year at a time, and then, as a

condition precedent to the annual readmission, deal arbitrarily with such foreign corporations, the guaranties of the Federal Constitution would be avoided. Under such practice the foreign corporation may in reality be within the limits of the State for many years but at all times subject to discrimination in favor of similar domestic corporations. That should be just as offensive as the situations dealt with in the class of cases considered in the opinion in the *Hanover case*. A state should not be presumed to have limited the admission of foreign corporations into the State to a definite period in the absence of clear and express language to that effect. But where it is found that the State so intended, the practice should meet with condemnation from this Court.

The requirements of the Oklahoma law that domestic as well as foreign insurance companies obtain annual licenses is a proper regulation of the business. But we fail to see how such requirements can fairly be interpreted as limiting the period of admission of foreign insurance companies to the period of each annual license.

Whether foreign corporations are admitted into Oklahoma for an indefinite period or for one year at a time, the tax law here in question applies a discriminatory tax after the issuance of each annual license, and cannot constitute a valid condition precedent either to an annual admission or the renewal of the annual license.

We respectfully submit that under the construction by the Supreme Court of Oklahoma the statutes, the judgment

here under review, and the tax exaction and imposition merged therein, are repugnant to the guaranties of the Fourteenth Amendment, and that the judgment should be reversed.

Respectfully submitted,

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March, 1945.

APPENDIX

TEXT OF OKLAHOMA CONSTITUTION AND STATUTES CHRONOLOGICALLY ARRANGED

PROVISIONS OF CONSTITUTION OF OKLAHOMA

Sections 1, 2 and 3 of Artiele XIX of the Constitution of Oklahoma read as follows:

"1. FOREIGN INSURANCE COMPANIES—CONDITIONS OF DOING BUSINESS.

"No foreign insurance company shall be granted a license or permitted to do business in this State until it shall have complied with the laws of the State, including the deposit of such collateral or indemnity for the protection of its patrons within this State as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license.

"2. ENTRANCE FEES—ANNUAL TAX.

"Until otherwise provided by law, all foreign insurance companies, including surety and bond companies, doing business in the State, except fraternal insurance companies, shall pay to the Insurance Commissioner for the use of the State, an entrance fee as follows:

"Each foreign Life Insurance Company, per annum, two hundred dollars; each Foreign Fire Insurance Company, per annum, one hundred dollars; each For-

eign Accident and Health Insurance Company, jointly, per annum, one hundred dollars; each Surety and Bond Company, per annum, one hundred and fifty dollars; each Plate Glass Insurance Company (not accident), per annum, twenty-five dollars; each foreign live stock insurance company, per annum, twenty-five dollars.

"Until otherwise provided by law, domestic companies excepted, each insurance company, including surety and bond companies, doing business in this State, shall pay an annual tax of two per centum on all premiums collected in the State, after all cancellations are deducted, and a tax of three dollars on each local agent.

"3. NON-PROFIT INSURANCE ORGANIZATIONS.

"The revenue and tax provisions of this Constitution shall not include, but the State shall provide for the following classes of insurance organizations not conducted for profit, and insuring only their own members:

"First, farm companies insuring farm property and products thereon; second, Trades Insurance Companies insuring the property and interest of one line of business; third Fraternal Life, Health, and Accident Insurance in Fraternal and Civic Orders, and in all of which the interests of the members of each respectively shall be uniform and mutual."

GENERAL INSURANCE ACT OF 1909

(Chapter 21, Article 1, page 312, Session Laws of Oklahoma 1909, approved March 17, 1909.)

"A Bill Entitled an Act Relating to Insurance * * *."

Sec. 5—(Sec. 8, Tit. 36, Okla. Stat. 1941—BUSINESS LIMITED BY CERTIFICATE—OTHER RESTRICTIONS ON BUSINESS CARRIED ON):

"No company shall be formed in this State or foreign company admitted to this State, for the purpose of engaging in any kind of insurance other than that specified in its certificate of incorporation, original or amended, nor any kind of business except that allowed domestic corporations under this act."

Sec 11—(Sec. 47, Tit. 36, Okla. Stat. 1941—CERTIFICATES ISSUED—COMMISSIONER TO EXAMINE FIRST—BOOKS AND RECORDS):

"Before granting certificates of authority to an insurance company to issue policies or make contracts of insurance, the Insurance Commissioner shall be satisfied, by such examination as he may make and such evidence as he may require, that such company is otherwise duly qualified under the laws of the State to transact business herein."

Sec. 12—(Sec. 48, Tit. 36, Okla. Stat. 1941—PROVIDES FOR EXAMINATION AND AUDIT OF FOREIGN COMPANIES.

Sec. 13—(Sec. 49, Tit. 36, Okla. Stat. 1941—EXAMINATION AND AUDIT OF FOREIGN COMPANIES):

"Whenever the Insurance Commissioner deems it prudent for the protection of the policy holders of this

State, he shall, in like manner, visit and examine or cause to be visited and examined by some competent person or persons whom he may appoint for that purpose, any foreign insurance company applying for admission or already admitted to do business in this State."

Sec. 15—(Sec. 51, Tit. 36, Okla. Stat. 1941—FOREIGN COMPANIES' AUTHORITY REVOKED, WHEN—MANNER):

"If the Insurance Commissioner is of the opinion, upon examination or other evidence, that any foreign insurance company is in an unsound condition or has failed to comply with the law or with the provisions of its charter or that its condition is such as to render the proceedings hazardous to the public or to its policy holders or that its actual funds, exclusive of capital stock, are less than its liabilities, or if it or its officers, directors, trustees or agents refuse to submit to an examination or to perform any legal obligation relative thereto or fail to pay any final judgment against it by a citizen of this State, he shall revoke or suspend all certificates of authority granted to it or its agents and shall cause notification thereof to be published in one or more newspapers of general circulation in the State, and no new business shall thereafter be done by it or its agents in this State while such default or disability continues, nor until its authority to do business is restored by the Insurance Commissioner; provided, however, that unless the ground for revocation or suspension relates only to the financial condition or the soundness of the company or to a deficiency in its assets, he shall notify the company, not less than ten days before revoking its authority to do business in this State, and he shall specify in the notice the particulars of the supposed violation."

Sec. 18, as amended, being Sec. 101, Tit. 36, Okla. Stat. 1941—(FOREIGN INSURANCE COMPANIES—CONDITIONS OF ADMISSION TO DO BUSINESS):

"No foreign insurance company shall be admitted and authorized to do business in this State until:

"First: It shall file or deposit with the Insurance Commissioner a properly certified copy of its charter, or deed of settlement, and a statement of its financial condition and business on the thirty-first day of December preceding the day on which it shall apply for permission to transact such business, including such other information and in such form and detail as the Insurance Commissioner may require, signed and sworn to by its president and secretary and other proper officers.

"Second: It shall satisfy the Insurance Commissioner that it is fully and legally organized under the laws of its State or Government to do the business it proposes to transact in this State; that, if a life insurance company, a surety company or a bond company, it has on deposit with the Treasurer of this State or with the proper officer of some other state, securities to the actual cash value of at least one hundred thousand dollars consisting of the bonds of this State, the United States, or the state in which such company is organized, or notes or bonds secured by mortgages on improved real estate worth double the amount of such notes or bonds, and such company shall file with the Insurance Commissioner the certificate of the official with whom its securities are deposited stating the time and amount of each of said bonds, notes or stocks, and that he is satisfied that they are worth one hundred thousand dollars, and that the deposit is made with him by the company for the protection of all its policy

holders and creditors in the United States. Provided, that surety and bond companies shall be required to have not less than four hundred thousand dollars paid up capital in cash or invested in such securities as, under the laws of this State, domestic companies are allowed to invest in, which are satisfactory to the Insurance Commissioner.

"Third: Insurance companies, other than surety and bond companies, shall be required to have a paid up capital or guaranty capital or surplus of not less than one hundred thousand dollars in cash or invested in securities satisfactory to the Insurance Commissioner and consisting of such securities as under the laws of this State, domestic companies are allowed to invest in; provided, however, that the funds of such foreign insurance companies in excess of such minimum of one hundred thousand dollars may at all times be invested in such securities as are or may be authorized by the laws of the state in which such companies are organized or in which they have and maintain their United States deposit. Nothing in this section shall be construed to permit the admission of mutual companies other than as provided in Section 3 of this Act, except fraternal and benevolent orders and societies.

"Fourth: It shall, by duly executed instrument filed in his office, constitute and appoint the Insurance Commissioner, or his successor, its true and lawful attorney, upon whom all lawful processes in any action or legal proceeding against it may be served and therein shall agree that any lawful process against it, which may be served upon its said attorney, shall be of the same force and validity as if served upon the company, and that the authority thereof shall continue in force,

irrevocable, as long as any liability of the company remains outstanding in this State. Any process issued by any court of record in this State, and served upon such Commissioner by the proper officer of the county in which said Commissioner may have his office, shall be deemed a sufficient process on said company, and it is hereby made the duty of the Insurance Commissioner to promptly, after such service of process, forward by registered mail, an exact copy of such notice to the company; or, in case the company is of a foreign country, to the resident manager in this country; and also shall forward a copy thereof to the general agent of said company in this State. For power of attorney, each company shall pay a fee of three dollars, and for each copy of the process, the Insurance Commissioner shall collect the sum of three dollars, which shall be paid by the plaintiff at the time of such service, the same to be recovered by him as a part of the taxable cost, if he prevails in his suit (R. L. 1910, Secs. 3421, 3422; Laws 1910-11, ch. 93, p. 203, Sec. 1; Laws 1925, ch. 131, p. 196, Sec. 1)."

Sec. 21—(Sec. 56, Tit. 36, Okla. Stat. 1941—ANNUAL STATEMENT BY COMPANIES—ANNUAL LICENSE):

"The Insurance Commissioner shall, in December of each year, furnish to each of the insurance companies, authorized to do business under the provisions of this act, two or more blanks in form adopted for their annual statement, and such companies shall, annually, on or before the last day of February, file in the office of the Insurance Commissioner a statement which shall exhibit its financial condition on the 31st day of December of previous year and its business of that year. For good cause shown, the Commissioner may extend the time within which such statement may be filed.

Every such annual statement shall be in the form and of the specifications the Insurance Commissioner may require. The assets and liabilities shall be computed and allowed in accordance with the laws of this State. Such statement shall be subscribed and sworn to by the president and secretary and other proper officers. And if the Insurance Commissioner finds that the facts warrant, and that all laws applicable to said company are fully complied with, he shall issue to said company a license or certificate of authority, subject to all requirements and conditions of the law, to transact business in this State, specifying in said certificate the particular kind or kinds of insurance it is authorized to transact, and said certificate shall expire on the last day of February next after its issue. The annual statement of a company of a foreign country shall embrace only its business and condition in the United States, and shall be subscribed and sworn to by its resident manager or principal representative in charge of its American business."

Sec. 22, as amended, being Sec. 10478, Okla. Stat. 1931—(FOREIGN COMPANIES—ANNUAL REPORT OF PREMIUMS—FEES AND TAXES):

"Every foreign insurance company doing business in this State under the provisions of this article shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January or since the last return of such premiums was made by such company; and shall at the same time pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of

two per cent on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, and an annual tax of three dollars on each local agent, and such other fees as may be paid to said Insurance Commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State.

[THIS SECTION WAS AMENDED BY Sec. 1, ch. 1a., Tit. 36, Session Laws of Oklahoma, 1941, *infra*. (Tit. 36, Okla. Stat. 1941, Sec. 104) WHICH INCREASED THE RATE OF THE TAX TO 4%.]

Sec. 25, at amended, being Sec. 121, Tit. 36, Okla. Stat. 1941—(AGENTS—LICENSE OF AGENTS):

"Upon written notice by an authorized foreign insurance company of its appointment of a suitable person to act as its agent within this State, and the payment of three dollars, the Insurance Commissioner shall, if the facts warrant it, grant to such person a license, which shall state in substance that the company is authorized to do business in this State and that the person named therein is a constituted agent of the company for the transaction of such business as

it is authorized to do in this State: Provided, that domestic insurance companies shall pay fifty cents, only, for each agent's license. Said license shall continue in force until the last day of February next after its issue, and, by the renewal thereof, on the annual payment for such renewal of three dollars, if a foreign company, and if a domestic company, on the annual payment of fifty cents, until revoked by the Insurance Commissioner for non-compliance with the laws or until the company, by written notice to the Insurance Commissioner, cancels the agent's authority to act for it. While such license remains in force, the company shall be bound by the acts of the person named therein within his authority as its acknowledged agent (R. L. 1910, Sec. 3429)."

Sec. 26, as amended, being Sec. 122, Tit. 36, Okla. Stat. 1941—(VIOLATION BY AGENT A MISDEMEANOR—PENALTY):

"Whoever shall, directly or indirectly, aid in transacting insurance business for any such company without first receiving such certificate of authority, or after receiving from such Insurance Commissioner notice of the revocation thereof continue to act as agent for any such company, shall be deemed to be guilty of a misdemeanor, and upon conviction by a court having jurisdiction, be fined not less than one hundred dollars nor more than five hundred dollars; the issuance of each policy or contract shall constitute a separate and distinct offense (R. L. 1910, Sec. 3430)."

Sec. 29, as amended, being Sec. 124, Tit. 36, Okla. Stat. 1941—(PERSONAL LIABILITY OF AGENT—UNLAWFUL CONTRACT):

"Every agent or other person shall be personally liable on all contracts of insurance unlawfully made by or through him, directly or indirectly, for or on behalf of any insurance company not authorized to do business in this State (R. L. 1910, Sec. 3432)."

Sec. 31—(Sec. 126, Tit. 36, Okla. Stat. 1941—RESIDENT AGENTS FOR FOREIGN COMPANIES—EXCEPTIONS):

"Foreign companies admitted to do business in this State shall make contracts of insurance upon lives, property or interests herein, only through lawfully constituted and licensed resident aegnts: * * *"

Sec. 61, as amended, being Sec. 199, Tit. 36, Okla. Stat. 1941—(GENERAL AGENCY IN STATE REQUIRED):

"All life insurance companies doing business under the laws of this State shall be required to maintain a general agency within the State, in charge of a resident general agent (R. L. 1910, Sec. 3464)."

OKLAHOMA 4% GROSS PREMIUM TAX ACT OF 1941

(Chapter 1a, Title 36, pp. 121, 122, Session Laws of Oklahoma 1941.)

"AN ACT amending Section 10478 and Section 10479, Oklahoma Statutes, 1931; providing for an annual tax of four per cent (4%) on all premiums collected in this State, with certain deductions to be paid by all foreign insurance companies doing business in

the State of Oklahoma; extending the provisions of such statute to include every foreign corporation, co-partnership, association, inter-insurance exchange or individual who is a non-resident of the State of Oklahoma, doing an insurance business of any nature whatsoever; and providing for the distribution and appropriation of such taxes; and declaring an emergency.

"BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

"REPORTS—GROSS PREMIUMS.

"Section 1. That Section 10478, Oklahoma Statutes of 1931 be and is hereby amended to read as follows:

" 'Every foreign insurance company, co-partnership, association, inter-insurance exchange or individual who is a non-resident of the State of Oklahoma, doing business in the State of Oklahoma in the execution of exchange contracts of indemnity, or as an insurance company of any nature or character whatsoever, shall, annually, on or before the last day of February, report under oath of the president or secretary or other chief officer of such company to the Insurance Commissioner, the total amount of gross premiums received in this State within the twelve months next preceding the first of January, or since the last return of such premiums was made by such company; and shall, at the same time, pay to the Insurance Commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and an annual tax of four per cent (4%) on all premiums collected in this State, after all cancellations and dividends to policy holders are deducted, which tax, in addition to an annual tax of three dollars ($3.00) on each agent, to be paid to the State Insurance Board as now provided by Section 10542, Oklahoma Statutes, 1931, shall

be in lieu of all other taxes or fees, and the taxes and fees of any sub-division or municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the Insurance Commissioner, in addition to the amount of said taxes, the sum of five hundred dollars ($500.00); and the company so failing and neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the Insurance Commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State' (Tit. 36, Sec. 104, Okla. Stat. 1941).

"REPORT AND DISBURSEMENT.

"Section 2. That Section 10479, Oklahoma Statutes, 1931, be and is hereby amended to read as follows:

"'The Insurance Commissioner shall report and disburse all taxes collected under Section 1 hereof and the same are hereby appropriated as follows, to-wit:

"'(a) One-half or fifty (50%) per cent of the four (4%) per cent collected on all premiums by fire insurance companies in this State, shall be allocated and disbursed for the fireman's relief and pension fund as provided for in Sections 6110, 6111, 6112, and 6113 of the Oklahoma Statutes, 1931.

"'(b) All the balance and remainder of the annual tax of four (4%) per cent provided for in Section 1 hereof shall be paid to the State Treasurer to the credit of the General Fund of the State.

"'The Insurance Commissioner shall keep an accurate record of all such funds and make an itemized statement and furnish same to the State Auditor, as

do other departments of this State. The report shall be accompanied by an affidavit of the Insurance Commissioner or the chief clerk of his office certifying to the correctness thereof. Provided that nothing herein shall be construed as repealing or affecting the provisions of Section 3744 of the Oklahoma Statutes, 1931' (Tit. 36, Sec. 57, Okla. Stat. 1941).

"Approved April 25, 1941. Emergency."

ILLINOIS PREMIUM TAX ACT OF 1919

(Act of June 28, 1919, ch. 73, Cahill's Rev. Stat. of Illinois, 1925.)

"An Act in Relation to the Taxation of Non-Resident Corporations, Companies, and Associations for the Privilege of Doing an Insurance Business in this State.

"Section 1. BE IT ENACTED BY THE PEOPLE OF THE STATE OF ILLINOIS, REPRESENTED IN THE GENERAL ASSEMBLY: That each non-resident corporation, company, and association licensed and admitted to do an insurance business in this State shall, except as herein otherwise provided, pay an annual state tax for the privilege of doing an insurance business in this State, equal to two per centum of the gross amount of premiums received during the preceding calendar year * * *.

* * * * * * * * * *

"Section 6. * * * the tax herein provided to be paid shall be due and payable on the first day of July of each year, and shall be the tax for the year commencing on the first day of July in which it is due and ending on the thirtieth day of June next thereafter.

* * * * * * * * * *

"Section 9. On or before the fifteenth day of May of each year, the Department of Trade and Commerce shall mail a notice in writing to each corporation, company, and association against which a tax is assessed, stating the amount of the tax assessed against it for the year next ensuing commencing on July 1 * * *. Such notice shall further state that the tax therein assessed is payable to the Department of Trade and Commerce on July 1, after the date of said notice.

* * * * * * * * *

"Section 13. Each corporation, company, or association applying for a license to do an insurance business in this State, and which was not licensed to do such business in this State during the preceding calendar year, or any part thereof, shall, before said license is issued, pay to the Department of Trade and Commerce at the rate of three hundred dollars per annum for as many months as will elapse between the date of issuance of such license and the first day of July of the calendar year succeeding the calendar year in which such license is issued, and such payment shall be for the privilege of doing an insurance business in this State, during the period aforesaid.

* * * * * * * * *

"Section 15. The authority of each non-resident corporation, company, and association, admitted to do an insurance business in this State, shall be evidenced by a license to be issued by the Department of Trade and Commerce, in which shall be stated the kind or kinds of insurance business authorized to be transacted. All licenses issued by virtue of the provisions hereof shall terminate on the thirtieth day of June next after the date thereof, and may be renewed annually thereafter upon compliance with the laws of this State. * * *"

FILE COPY

Supreme Court of the United States

(OCTOBER TERM, 1944)

No. 833

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
a corporation,
Appellant,

VERSUS

JESS G. READ, the Insurance Commissioner of the State of Oklahoma et al.,
Appellees.

REPLY BRIEF OF APPELLANT

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April, 1945.

UTTERBACK TYPESETTING CO., 13 S. Walker, Oklahoma City 4, Okla.

TABLE OF CASES

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I.

Reply to First Proposition of Appellees.

The first proposition, stated on pages 4-12 of appellees' answer brief, pertains to matters of local practice. We fail to understand the purpose of that proposition, since their failure to comply with Rule 12, paragraph 3, of this Court prevents this from being treated as a motion to dismiss, and since they admit it is a matter which, never having been raised heretofore, cannot now be considered. We feel it our duty, however, to reply to it.

An analysis of the whole of the decision of the Oklahoma Supreme Court (R. 48-68) shows that that Court

based its decision against appellant solely on the Court's answer to the Federal question. Under the view which it took of the pleadings, its decision of that point was essential to a disposition of the case.

But appellees assert in this proposition that under a construction of the pleadings now offered for the first time, the judgment appealed from is correct, irrespective of the Federal question.

In the first place, any controversy relating to the pleadings and practice in Oklahoma is purely a matter of local law and beyond the jurisdiction assumed by this Court. For example, in *Buena Vista County* v. *Iowa Falls etc., R. R. Co.*, 112 U. S. 167-177, 28 L. Ed. 680, this Court said:

> "Other errors are assigned upon the record, relating, however, to matters of pleading and practice under the laws of the State, which, as they involve no Federal question, are not proper for our consideration."

See, also, *Thorington* v. *The City Council of Montgomery*, 147 U. S. 490, 495, 37 L. Ed. 252; *Kennard* v. *Louisiana*, 92 U. S. 480, 23 L. Ed. 478; *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499, 75 L. Ed. 482.

Furthermore, whether there is properly a Federal question in the case or not, is conclusively settled by the assumption of the state court that there is. In *Miedreich* v. *Lauenstein*, 232 U. S. 236, 58 L. Ed. 584, this Court said:

> "Where a state court holds that a Federal question is made before it, according to its practice, and proceeds to determine it, this Court will regard the question as duly made."

See, also, *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S. 23, 76 L. Ed. 146; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 72 L. Ed. 565; *Manhattan Life Ins. Co.* v. *Cohen*, 234 U. S. 123-134, 58 L. Ed. 1245; *North Carolina R. R. Co.* v. *Zachary*, 232 U. S. 248, 58 L. Ed. 591; *Nickey* v. *Mississippi*, 292 U. S. 393, 78 L. Ed. 1323; *Whitfield* v. *Ohio*, 297 U. S. 431, 80 L. Ed. 778; *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 74 L. Ed. 926; *Ohio ex rel. Clarke* v. *Deckebach*, 274 U. S. 392, 71 L. Ed. 1115; *Cissna* v. *Tennessee*, 246 U. S. 289, 62 L. Ed. 720; *Chicago, R. I. & P. R. Co.* v. *Perry*, 259 U. S. 548, 66 L. Ed. 1056.

Appellees' analysis is incorrect, but the fact that there might be lurking in the record some point of local law broad enough to sustain the judgment, avails nothing where the state court based its decision solely upon the Federal question.

The rule is stated in *Grayson* v. *Harris*, 267 U. S. 352-358, 69 L. Ed. 652, as follows:

> "The rule that, when the decision of a state court may rest upon a non-Federal ground adequate to support it, this Court will not take jurisdiction to determine the Federal question, has no application where, as here, the non-Federal ground might have been considered by the state court, but was not."

See, also, *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 592, 43 L. Ed. 823; *St. Louis I. M. & S. R. Co.* v. *McWhirter*, 229 U. S. 265, 57 L. Ed. 1179; *International Steel &*

Iron Co. v. *National Surety Co.*, 297 U. S. 657, 80 L. Ed. 961; *Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95, 82 L. Ed. 685.

The foregoing discussion is necessarily brief because of the lateness of this thrust by appellees, but we earnestly urge to this Court that, if it entertain any serious doubt as to its jurisdiction, or as to the propriety of its disposing of the Federal question herein, we be allowed opportunity to answer this proposition adequately, in line with the spirit and intent of this Court's Rule 7, paragraph 3.

II.

Reply to Second, Third and Fourth Propositions of Appellees.

Although appellees on pages 2 and 3 of their brief concede that the pleadings, and the brief of appellees in the Oklahoma Supreme Court, admit that the tax law in question discriminates against foreign insurance companies and produces revenue in excess of the cost of administration, they say that such pleadings and brief do not admit that said law was enacted for a "revenue producing purpose."

That said law was enacted for revenue-producing purposes is alleged in appellant's petition (R. 29) and is further established by the operation and effect of said law as applied and enforced by the State. It is made clear by the quotations from the opinion of the Oklahoma Supreme Court appearing on pages 8 and 9 of brief of ap-

pellant, that said law operates and applies each year after the license is issued and in effect exacts a tax and not a fee. As said by this Court in *St. Louis Southwestern R. Co.* v. *Arkansas*, 235 U. S. 350, at page 362, 59 L. Ed. 265, 271:

> "The controlling test is to be found in the operation and effect of the law as applied and enforced by the state."

In *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494, 71 L. Ed. 372, this Court, after quoting with approval on page 510 of its opinion the foregoing passage from the Arkansas case, said on page 515:

> "Tax laws made to apply after it has been so received into the state are to be considered laws enacted for the purpose of raising revenue for the state and must conform to the equal protection clause of the 14th Amendment."

On pages 19 to 22 of appellees' brief the requirements made of foreign insurance companies under administrative interpretation and practice are set forth. All the requirements except (e) on pages 19 and 21 operate and apply as valid conditions precedent as defined in the *Hanover* case. But requirement (e) applies the admittedly discriminatory gross premium tax on business done after such corporation is received into the State, and after the issuance of each renewal license. The tax is paid at the end of each license year for the past. Requirement (e) therefore requires the foreign corporation as a condition of its entry into the State to agree to submit to discriminatory taxation. It is therefore required to waive its rights to equal protection of the

laws guaranteed to it under the Fourteenth Amendment to the Federal Constitution. The State does not have that power, as we have shown on pages 21-23 of brief of appellant.

As this Court has stated in *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 533, 66 L. Ed. 352:

> "The sovereign power of a state in excluding foreign corporations, as in the exercise of all others of its sovereign powers, is subject to the limitations of the supreme fundamental law."

In the *Terral* case the Court further says:

> "It follows that the case of *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148, and *Security Mut. L. Ins. Co.* v. *Prewitt*, 202 U. S. 246, 50 L. Ed. 1013, 26 Sup. Ct. Rep. 619, 6 Ann. Cas. 317, must be considered as overruled and that the views of the minority judges in those cases have become the law of this Court."

The dissenting opinion (now the law of this Court) in the case of *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148, says:

> "Though a state may have the power (if it sees fit to subject its citizens to the inconvenience) of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so. Total prohibition may produce suffering and may manifest a spirit of unfriendliness toward sister states; but prohibition, except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility and disloyalty to

the general government. If a state is unwise enough to legislate the one, it has no constitutional power to legislate the other."

In the case of *Security Mut. Life Ins. Co.* v. *Prewitt*, 202 U. S. 246, 258, 50 L. Ed. 1013, the Court had for review a case turning upon the right of a state court, as a condition of admitting a foreign corporation, to prescribe that the licensed corporation shall not remove cases to the Federal Court. The minority opinion (now the law of this Court) says:

> "In all the cases in which this Court has considered the subject of the granting by a State to foreign corporations of its consent to the transaction of business in the State, it has uniformly asserted that *no conditions can be imposed by the State which are repugnant to the Constitution and laws of the United States*" (p. 261).

The same opinion further says:

> "The doctrine that the surrender of rights granted or secured by the Constitution of the United States may be made a condition of the privilege of doing or continuing business within a state is at war with that instrument, and if adopted or sanctioned by all of the states would nullify the supreme law of the land in some of its most essential provisions" (p. 262).

It is also said in the opinion:

> "If a state may lawfully withhold the right of transacting business within its borders, or exclude foreign corporations from the state upon the condition that they shall surrender a constitutional right given in

the privilege of the companies to appeal to the courts of the United States, there is nothing to prevent the state from applying the same doctrine to any other constitutional right, which, though differing in character, has no higher or better protection in the Constitution than the one under consideration. If the state may make the right to transact business dependent upon the surrender of one constitutional privilege, it may do so upon another, and finally upon all. In pursuance of the principle announced in this case, that the right of the state to exclude includes the right, when exercised for any reason or for no reason, the state may say to the foreign corporation, 'You may do business within this state, provided you will yield all right to be protected against deprivation of property without due process of law, or provided you surrender your right to have compensation for your property when taken for private use, or provided you surrender all right to the equal protection of laws;' and so on through the category of rights secured by the Constitution, and deemed essential to the protection of people and corporations living under our institutions" (p. 267).

On page 23 of the brief of appellees it is stated that the *Philadelphia Fire Association* case pointed out the way to make an annual gross premium tax constitutional. That case is discussed on pages 35-39 of the brief of appellant. It is important to note in that case it is held that the state has the power to change the conditions of admission at any time, *for the future,* and to impose a new or further tax, *as a license fee.* We will hereinafter show that later cases hold that the State's power so to do is not unlimited. However, the State of Oklahoma had not seen fit to follow

the way pointed out in that case, prior to the recent amendment of the Oklahoma gross premium tax law which was enacted in February, 1945. Illinois saw fit to do so by the 1919 gross premium tax law which was incidentally involved in the *Hanover* case as is shown on pages 29-32 of the brief of appellant.

The Oklahoma Supreme Court in this case has held that the Oklahoma gross premium tax here in question operates in the manner as appears in the quotations from its opinion on pages 8 and 9 of the brief of appellant. We have discussed the operation of that tax on pages 23-24 of brief of appellant.

Appellees concede (Brief, pp. 13-14) that this Court is concluded by the decision of the Oklahoma Supreme Court on the question of construction, as pointed out on page 17 of brief of appellant. There it is shown that the controlling test of constitutionality is not in the name given the tax by the State, but is to be found in the operation and effect of the law as applied and enforced by the State. And we have further shown on page 46 of brief of appellant that where the State, as Oklahoma has done, makes the tax laws apply after the foreign corporation is received into the State, they are to be considered as enacted for the purpose of raising revenue and must conform to the equal protection clause of the Fourteenth Amendment. Appellees obviously are attaching controlling importance to name and characterization by their reference on pages 16, 25, and 26 of brief of appellees to gross premium tax laws of other states.

On page 27 of their brief, appellees quote from the case of *New York Life Ins. Co.* v. *Bd. of Com'rs of Oklahoma Co.*, 155 Okla. 247, 9 Pac. (2d) 936. Following the passages quoted in appellees' brief, that Court further said:

> "The state has the power to impose these conditions, which are subject to no constitutional limitation or inhibition, except that such taxes and fees 'shall be uniform upon the same class or subjects' and shall not be in conflict with the Federal Constitution."

That case involved only the question whether the gross premium tax was in lieu of *ad valorem* taxes and the Court held it was not.

On page 30 of the brief of appellees the holding of the Oklahoma Supreme Court that it is not essential that a privilege tax be paid before the exercise of the privilege, is emphasized. Our answer appears on pages 28 and 29 of brief of appellant.

On page 31 of brief of appellees reference is made to the discussion of the *Hanover* case by the Oklahoma Supreme Court, and then appellees say:

> "* * * but as said Court's interpretation of the meaning of the Illinois law involved therein is not binding on this Court, appellees will not burden this subhead of our brief with further reference thereto."

The Oklahoma Supreme Court, in attempting to distinguish the *Hanover* case from the case at bar, said that the Illinois gross premium tax and the Oklahoma gross premium tax are "almost the same." It is obvious that

it failed to observe the operation of the said Illinois law. We gave careful consideration to the difference in the operation of the gross premium tax laws of Oklahoma and Illinois in our discussion on pages 23-24 and 27-32 of brief of appellent. That discussion goes to the controlling test, which neither the Oklahoma Supreme Court nor the appellees appear to consider as important.

That the appellees are considering the name and character of the tax, rather than its operation, as controlling is borne out in their discussion of the *Hanover* case on pages 33-39 of brief of appellees. Without any observation regarding the operation of the 1919 gross premium tax law of Illinois, although its pertinent provisions are set forth on pages xiv-xv of the appendix to the brief of appellant, appellees on pages 33 and 37 of brief of appellees refer to said law as being essentially the same as the law involved here.

It should be remembered, as we pointed out in our discussion of the characterization of taxes, on pages 14-20 of brief of appellant, that when the *Hanover* case was decided the net receipts tax there held invalid was characterized by the State Court as a privilege tax. The 1919 gross premium tax of Illinois was also a privilege tax. But the invalid net receipts tax of Illinois applied a discriminatory tax burden each year during the period of the license, as does the Oklahoma gross premium tax here, while the gross premium tax under the 1919 law of Illinois is exacted and paid each year as a fee for the future before the license is issued.

On page 39 of their brief appellees attempt to distinguish the *Shaffer Oil & Refining Company* case by inferring that the foreign corporations there were doing business under an "indefinite license." The Oklahoma license fee statute enacted in 1927 was there in question. The decision points out that the laws since 1910 required foreign corporations to procure a license annually, and that the foreign corporations in the case had acquired tangible and intangible property of great value in the State. That case cited and relied upon the *Hanover* and *Greene* cases and recognized and enforced the limitation to the power of the State of Oklahoma against the exaction of a discriminatory license fee, where valuable rights acquired over a long period of time were affected.

Appellees further evade the controlling test which is to be found in the operation of the laws in question, and misconstrue appellant's contentions in the discussion appearing on pages 40-45 of their brief. Appellees say on page 41:

> "For example, if said contention is sound, a state law would be invalid under the Fourteenth Amendment which expressly imposes a discriminatory license fee or tax of $1,000.00 on a foreign corporation for the right or privilege of entering the state and doing business therein *for a period of either one or twenty years,* if said law *provides* that one-half of said fee or tax is payable on or prior to the commencement of said period and the other one-half payable ten days thereafter."

It may be observed therefrom that *before* the foreign corporation is admitted into the State the license fee of $1,000.00 is established. It is capable of being paid *before* the license is issued. Its determination is not dependent upon business done *after* admission of the foreign company into the State. It is not a tax on business done, and it is not exacted after the privilege of doing business has been exercised. It is strictly a *fee* for the future, and is distinguishable from the *tax* for the past in question here.

The essence of appellees' contention (Brief, pp. 42-43) is that the discriminatory tax in question is "assumed" by appellant as a "condition precedent" to the issuance of the license. Since the tax is "assumed," it necessarily follows that appellant *agrees* as a "condition precedent" to the issuance of its license that it will pay a discriminatory tax on business done after entry.

The discriminatory tax operates and applies after admission and cannot be paid as a "condition precedent," so the State exacts the *agreement* as a condition of entry. That agreement constitutes a waiver by appellant of its rights to the equal protection of the laws. The State does not have that power according to the authorities first cited under this subdivision, and as said in the *Hanover* case (p. 507):

> "* * * the state may not exact as a condition of the corporation's engaging in business within its limits that its rights secured to it by the Constitution of the United States may be infringed."

Regarding the quotation from the *New York Life Insurance Company* case on page 44 of brief of appellees, we agree that a gross premium tax is an equitable mode of taxation in the absence of discrimination against foreign insurance companies in favor of competing domestic insurance companies.

Appellant contends that according to the construction of the tax by the Oklahoma Supreme Court, as revealed by the quotations on pages 8-9 of brief of appellant, it is plain that compliance therewith is not a condition precedent to permission to do business in Oklahoma. See pages 24-33 of the brief of appellant. However, if this Court should reach a contrary conclusion, we nevertheless suggest that the State's power to change or revise the conditions upon which business is permitted is not unlimited.

Under the regulatory powers of the State, licenses are issued to both domestic and foreign insurance companies for one year at a time, expiring on the last day of February in each year, and are renewed from year to year. Appellant qualified and was received into the State in October, 1919, at which time it paid an entrance fee of $200.00 (R. 27-28). At that time the rate of the gross premium tax was 2%. Thereafter appellant has continued to transact business in Oklahoma by permission of the State under a renewal of its license each year. It has paid the annual license fee of $200.00 and the annual 2% gross premium tax (R. 27-28). Appellant has through many years, as alleged in its petition (R. 28), built up good will and established a successful and valuable life insurance business

within the State of Oklahoma. It has assembled at great expense, information and records respecting its policyholders and business within said State, the value of all of which would be destroyed if appellant were to be excluded from the State by a denial of the equal protection of the laws.

Then effective April 25, 1941, and after appellant had been a *quasi* citizen of Oklahoma for a period of more than 22 years and had established its business obligations and liabilities on the basis of the tax burdens above set forth, the rate of the gross premium tax was increased from 2% to 4% (R. 24-25).

The Oklahoma Supreme Court held (R. 66):

> "This being a tax for the privilege of doing business within the State during the year for which the privilege is granted by the State and exercised by the insurance company, as we have held, plaintiff became subject to the increased rate during the license year."

In *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S. 494, 71 L. Ed. 372, this Court on pages 508 and 509 recognized the similar plight of the foreign insurance company there involved, and then said (p. 509):

> "In the *Greene* case the license was indefinite. In this case it must be renewed from year to year, but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens."

The passage just quoted from the *Hanover* case unquestionably condemns the increased rate of the Oklahoma

gross premium tax insofar as it is applied to appellant during the license year expiring February 28, 1942. The exaction to that extent is also condemned by the early case of *Fire Association of Philadelphia* v. *New York*, 119 U. S. 110, 30 L. Ed. 342.

But we submit that when the above-quoted passage is considered in the light of the Court's further discussion of the question, a broader view must be taken of the rights guaranteed to the appellant under the Federal Constitution. We refer to the discussion appearing on pages 514 and 515 of the opinion in the *Hanover* case.

Earlier decisions dealing with the power of the State to change and revise its taxing system are there considered, after which Mr. Chief Justice Taft, speaking for the entire Court, said (p. 515):

> "* * *, but the decision in *Southern R. Co.* v. *Greene*, 216 U. S. 400, 54 L. Ed. 536, 30 Sup Ct. Rep. 287, 17 Ann Cas. 1247, shows that this power to change the tax imposed on a foreign corporation as a condition for the license of continuing business is not unlimited, and that any attempt in a renewal to vary the terms of the *original* license which, however indirectly, enforces a new condition upon the corporation and involves a deprivation of its Federal constitutional rights, cannot be effective" (Italics ours).

The *Shaffer Oil & Refining Company* case, cited on pages 42 and 43 of brief of appellant and hereinabove discussed, follows the rule just quoted.

The laws in question operate each year after appellant receives its annual license and applies a discriminatory tax

each year during the period of business permitted by the State. We contend that such is the case under the former rate of 2% as well as the present rate of 4%, and that appellant is thereby denied the equal protection of the laws.

If that contention of appellant is not sustained, we then contend that appellant is at least denied the equal protection of the laws by subjecting it to the increased rate of the tax.

Respectfully submitted,

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April, 1945.

FILE COPY

No. 833

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1944

THE LINCOLN NATIONAL LIFE INSURANCE COMPANY,
Appellant,
vs.
JESS G. READ, Insurance Commissioner of the State of Oklahoma; and CARL B. SEBRING, State Treasurer of the State of Oklahoma,
Appellees.

Appeal from the Supreme Court of the State of Oklahoma

Brief of Appellees

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April, 1945.

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Brief of Appellees

STATEMENT OF THE CASE

The Statement of the Case which appears on pages 1 to 9 of appellant's brief is substantially correct and hence appellees will not burden this brief with a separate statement. However, in order to clarify the issues and to supply certain omissions in said statement we deem it necessary to make the following additional statement.

Appellees agree with the assertion of appellant (B. 2) that:

> "The discriminatory nature of the tax is admitted, which brings into focus the controlling questions, viz: *Is the tax under consideration, in substance and effect, a fee or condition precedent to admission of foreign corporations into the State and outside the guaranties of the Fourteenth Amendment*, or is it a tax that must conform to the equal protection clause of the Fourteenth Amendment?",

but take the position that said questions are not the only questions involved in this appeal (as will hereinafter be shown), and that the fact the annual privilege taxes sought to be recovered in this action were paid after, rather than before; the exercise by the appellant insurance company of the privilege of entering Oklahoma and doing business therein during the license year for which said taxes were paid, is immaterial.

In this connection it will be noted that neither the pleadings nor the quotations from appellees' brief in the Oklahoma Supreme Court which appear on pages 5 and 6 of the appellant's brief admit or state that the law levying said privilege tax was enacted for a "revenue-producing purpose", as contended by appellant, but that said law discriminated against foreign insurance companies and produced revenue in excess of the cost of administration. *The purpose of said law was to levy a tax against foreign insurance companies for the right or privilege of entering Oklahoma and doing business therein during a license year and to fix said tax in an*

amount commensurate with the privilege granted and enjoyed.

Appellees also take the position that the assertion of appellant (B. 5) that it paid the taxes involved here

> "involuntarily and pursuant to the demand of appellee, Insurance Commissioner,"

to avoid statutory forfeitures, penalties etc., is immaterial, since this action was properly brought in a state court against the State of Oklahoma under authority of Section 12665 O. S. 1931 (quoted in the first proposition of this brief) and since this court held in the case of *Great Northern Life Insurance Company* v. *Jess G. Read*, Insurance Commissioner for the State of Oklahoma, 322 U. S. 47, 88 L. ed. 781 (hereinafter referred to as the Great Northern case), that in an action so brought, the

> "petitioner was relieved of the necessity of establishing that the payment was not voluntary and obtained the advantage of a statutory lien lis pendens on the tax payment."

Appellees take the further position that there is a primary question involved in this appeal (discussed in the first proposition of our argument herein) which, although omitted in appellant's brief, we think should be called to the attention of the court, to-wit: the question as to the right of appellant under authority of Section 12665, *supra*, to sue the State of Oklahoma to recover judgment, as sought in this appeal, *in an amount in excess of the $847.18 already awarded it by the Oklahoma Supreme Court.*

While appellees realize that the question involved in this proposition, although raised by our demurrer, was not presented to or passed on by the Supreme Court of Oklahoma (and hence may not be considered in this appeal), we also realize that if said proposition is sound (as we believe) the Attorney General of Oklahoma cannot waive, either directly or indirectly, the state's immunity in relation thereto. Therefore, appellees deem it proper to call said proposition to the attention of the court.

ARGUMENT

FIRST PROPOSITION

Appellant does not have the right under the provisions of Section 12665 O. S. 1931, to sue the State of Oklahoma to recover judgment, as sought in this appeal, in excess of the $847.18 already awarded it by the Oklahoma Supreme Court.

The above proposition presents what appellees believe to be a *primary question* involved in this appeal, which, although omitted from appellant's brief, we think should be called to the attention of the court, to-wit: the question as to the right of appellant under authority of Section 12665, *supra*, to sue the State of Oklahoma to recover judgment (this action is in reality if not in name a suit against the State of Oklahoma - Great Northern case), as sought by this appeal, in excess of the $847.18 already awarded it by the Oklahoma Supreme Court. In this connection we quote Section 12665, as follows:

"In all cases where the illegality of the tax is alleged to arise by reason of some action from which the law provides no appeal, *the aggrieved person shall pay the full amount of the taxes at the time and in the manner provided by law*, and shall give notice to the officer collecting the taxes showing the grounds of complaint and that suit will be brought against the officer for recovery of them. It shall be the duty of such collecting officer *to hold such taxes separate and apart from all other taxes collected by him, for a period of 30 days* and if within such time summons shall be served upon such officer in a suit for recovery of such taxes, the officer shall further hold such taxes, until the final determination of such suit. All such suits shall be brought in the court having jurisdiction thereof, and they shall have precedence therein; if, upon final determination of any such suit, the court shall determine that the taxes were illegally collected, as not being due the state, county or subdivisions of the county, the court shall render judgment showing the correct and legal amount of taxes due by such person, and shall issue such order in accordance with the court's findings, and if such order shows that the taxes so paid are in excess of the legal and correct amount due, the collecting officer shall pay to such person the excess and shall take his receipt therefor."

THE QUESTION ABOVE PRESENTED NECESSARILY ARISES IN THIS APPEAL, since:

(a) as stated on page 5 of appellant's brief, at the time it paid its taxes

> "it served notice of protest *according to law upon appellees.*

meaning according to the provisions of Section 12665, *supra*, which statute was held in the Great Northern case to authorize the state to be sued *as provided therein* to recover taxes paid under protest, and to be "the remedy exclusive of other state remedies."

(b) said Section 12665 provides that a taxpayer, in order to be entitled to sue the State to recover taxes deemed by him to be illegal,

> "shall pay the *full amount* of the taxes *at the time and in the manner provided by law*, and shall give notice to the officer collecting the taxes showing the grounds of complaint, and that suit will be brought against the officer for recovery of them,"

(c) the only tax sued for herein that was paid "at the time and in the manner provided by law," to-wit: on or before February 28, 1942 (36 O. S. 1941 § 104, quoted in the fourth proposition of this brief), was the $3,302.61 paid by appellant on February 26, 1942, referred to in the notice of protest set forth as Exhibit "A" (R. 7-10) of appellant's original petition herein (R. 1-13), said notice in substance stating that of said $3,302.61 payment:

> (1) the sum of $1,694.36 was a 4% tax on premiums collected by it in Oklahoma after January 1, 1941 and before April 25, 1941 (the effective date of 36 O. S. 1941 § 104, supra), and
>
> (2) the sum of $1,608.25 was a 4% tax on premiums collected by it in Oklahoma on

and after April 25, 1941 to December 31, 1941, inclusive,

(d) only one-half of said total payment of $3,302.61, to-wit: the sum of $1,651.31, was paid under protest, the protest notice stating that said amount was a tax "in excess of two per cent on all premiums collected in Oklahoma on insurance policies during the calendar year 1941", and

(e) the only part of said total payment of $3,302.61 (one-half of which was paid under protest, as aforesaid) which was *sued for* by appellant within the

"period of thirty days"

after the payment thereof, as required by Section 12665, supra, was the sum of $847.18 sued for in the first cause of action of appellant's original petition (see prayer of said petition, R. 7), same being one-half of the $1,694.36 referred to in Subdivision (1) of Paragraph (c), supra, and the exact amount of the judgment rendered in favor of appellant by the Oklahoma Supreme Court, as aforesaid, on the third cause of action of appellant's second amended petition (filed August 27, 1942), which judgment was not appealed to this court by either appellant or appellees and hence is a final judgment.

Supporting Argument

That the statements made in *Paragraphs (a) and (b), supra,* are correct, is revealed by an examination of Section 12665 and the construction thereof set forth in the Great Northern case. In this connection attention is called to the following excerpts from said case, *relating*

to the recovery of gross premium taxes for the same year that is involved here, to-wit:

> "The procedure for recovery is laid down by Section 12665, Oklahoma Statutes 1931. * * *
>
> "A suit against a state official under Section 12665 to recover taxes *is held to be a suit against the state of Oklahoma and the remedy exclusive of other state remedies. Antrim Lumber Co.* v. *Sneed, supra,* 175 Okla. at 51, 52 P. 2d at 1045. This interpretation of the Oklahoma statute by the Supreme Court of the state *accords with our view,* as set out above, of the meaning of a suit against a state. Petitioner brought this action against the collector, the Insurance Commissioner, in strict accord with the requirements of Section 12665. * * * By so doing petitioner was relieved of the necessity of establishing that the payment was not voluntary and obtained the advantage of a statutory lien lis pendens on the tax payment.
>
> "By Section 12665, Oklahoma creates a judicial procedure for the prompt recovery by the citizen of money wrongfully collected as taxes. *It is the sovereign's method of tax administration.* Oklahoma designates the official to be sued, orders him to hold the tax, empowers its courts to do complete justice by determining the amount properly due and directs its collector to pay back any excess received by the taxpayer."

That the statements made in *Paragraphs (c) and (d) supra,* are correct, is revealed by an examination of the notice of protest set forth as Exhibit "A" (R. 7-10) of appellant's original petition (said notice being also set forth as Exhibit "A" of appellant's second amended petition (R. 23-32), which notice of protest was timely filed with the Insurance Commissioner of

Oklahoma on February 26, 1942, as aforesaid. Said notice reveals a payment of $3,302.61 on that date as a 4% tax on premiums collected by appellant in Oklahoma during the period beginning January 1, 1941 and ending December 31, 1941, and states:

> "said payment includes the following amount which your protestant alleges is unconstitutional, illegal and void, to-wit:
>
> "Sixteen Hundred Fifty-one and 31/100 Dollars ($1651.31) being tax in excess of two per cent on all premiums collected in Oklahoma on insurance policies during the calendar year 1941."

Said notice further states that:

> "Demand is hereby made that said sum so paid under protest, to-wit: the sum of Sixteen Hundred Fifty-one and 31/100 Dollars ($1651.31), be repaid and refunded to the undersigned protestant.",

and that:

> "You and each of you are further notified that unless said sum so paid under protest is repaid that protestant will, *at the time and in the manner provided by law*, institute suit for the recovery of the same, or take other appropriate action to protect its legal rights and that you and each of you shall segregate said fund and *hold the same in a separate account and not pay the same into the State Treasury of this State for a period of thirty days from this date*, and that if suit be filed within such period, that such fund so segregated shall be further held pending the outcome of said suit, *all as provided by law.*"

While it is true that the notice of protest set forth as Exhibit "B" (R. 11-13) of both appellant's original

petition and second amended petition states an additional sum of $2,936.33 was paid by appellant to the Insurance Commissioner of Oklahoma under protest, it will be noted that *said amount was not so paid until March 17, 1942*, same not being paid "at the time and in the manner provided by law," to-wit: on or before February 28, 1942 (36 O. S. 1941 § 104, quoted in the fourth proposition of this brief), and hence Section 12665, *supra*, does not authorize appellant to file an action against the State to recover said amount.

That the statements made in *Paragraph (e) supra*, are correct, is revealed by an examination of the first cause of action (R 1 to 5) of appellant's original petition in the case at bar, same being the only petition setting forth a cause of action in favor of appellant and against appellees *which was filed within the "period of thirty days" authorized by Section 12665*. However, since said cause of action was in effect restated in the third cause of action of appellant's second amended petition, it remained in full force and effect, and the judgment thereunder for the sum of $847.18, referred to in said Paragraph (e), was authorized by Section 12665.

Supporting Authorities

In support of the conclusion above reached it will be noted:

(1) Statutes in derogation of sovereignty are strictly construed in favor of the State (59 C. J. 1141).

This general rule is supported by the case of *Hawks et al* v. *Walsh et al.*, 177 Okla. 564, 61 Pac. (2d) 1109, wherein it is held:

"It is universally held that statutes *permitting a state to be sued* are in derogation of its sovereignty and will be strictly construed."

(2) A general demurrer (see Paragraph 3 of Appellees' demurrer — R. 33) raises the statute of limitations, and by analogy also raises a bar to a suit against a sovereign state to recover specified taxes in relation to which there had been a failure to timely comply with the provisions of Section 12665. This is especially true where the demurrer (as here — Paragraph 2) states that the suit is without legislative consent.

In this connection it will be noted that in the case of *Antrim Lumber Co.* v. *Sneed, State Treasurer*, 175 Okla. 46, 52 Pac. (2d) 1040, cited with approval in the Great Northern case, the second paragraph of the syllabus is as follows:

"An action against the state may be maintained only when the state has given its consent thereto, *and then only at the time and in the manner and method provided by law.*"

The rule above stated as to the scope of a general demurrer, in so far as the statute of limitations is concerned, is supported by the recent case of *Weatherman, Adm'x.* v. *Victor Gasoline Co.*, 191 Okla. 423, 130 Pac. (2d) 527, wherein it is held:

"The defendant has, in addition to other questions, raised the statute of limitiations under its demurrer. This it was entitled to do under a general demurrer even without specific reference to the statute."

In the case of *Turner* v. *Pitts, Co. Treas.*, 162 Okla. 246, 19 Pac. (2d) 563, the fifth paragraph of the syllabus is as follows:

> "No amendment setting up a cause of action *not claimed in the original petition* should be allowed after the expiration of the time allowed by law to commence a suit on such claim."

(3) Where there is a variance between the allegations of a petition and an exhibit thereof (here — the notice of protest set forth as Exhibit "A"), the exhibit controls.

This general rule is supported by the case of In re Micco's Estate, 180 Okla. 183-184, 68 Pac. (2d) 789, wherein it is held:

> "This court has laid down the rule that where there is a variance between the allegations of the petition and exhibit, the exhibit must control."

Said rule is also supported by the third and fourth paragraphs of the syllabus of *Gannaway* v. *Standard Acc. Ins. Co.*, 85 Fed. (2d) 144, decided by the Circuit Court of Appeals of the Tenth Circuit, and by the first paragraph of the syllabus of *Interstate Land Company* v. *Maxwell Land Grant Company*, 139 U. S. 569-577, 35 L. ed. 278.

SECOND PROPOSITION

While a state court's interpretation as to the meaning of a state law is binding on the Supreme Court of the United States, it does not mean that said court may not exercise its independent judgment in determining whether said statute, with the meaning so given, violates the Federal Constitution.

On pages 14 to 20 of appellant's brief the above proposition is set forth, as follows:

> "This Court will accept the operation of the tax law and its characterization as determined by the state court, but will determine for itself whether, in the light of such operation, its effect would involve a violation of the Federal Constitution."

In support of the above proposition appellant cites the case of *Hanover Fire Ins. Co.* v. *Carr, County Treasurer* (hereinafter referred to as the Hanover case), 272 U. S. 494, 71 L. ed. 372 (discussed and analyzed in the fourth proposition of this brief), wherein this court laid down the following rule of law (same being quoted at the top of page 17 of appellant's brief), as follows:

> *"It is true that the interpretation put upon such a tax law of a state by its Supreme Court is binding upon this Court as to its meaning, but it is not true that this Court in accepting the meaning thus given may not exercise its independent judgment in determining whether with the meaning given, its effect would not involve a violation of the Federal Constitution."*

Appellant also quotes on page 17 of its brief an excerpt cited in the Hanover case from an earlier decision of this court in support of the above quoted rule of law,

but as appellees fully agree with said rule no further reference will be made thereto here.

Appellees will, however, show in the fourth proposition of this brief that under the interpretation given by the Supreme Court of Oklahoma as to the meaning of the constitutional and statutory provisions involved here said provisions, under applicable principles of law announced by this court, do not violate the Fourteenth Amendment of the Constitution of the United States as contended by appellant.

THIRD PROPOSITION

If the gross premium tax infringes upon guaranties under the Fourteenth Amendment to the Federal Constitution, it may not be validated by claims of waiver under Section 1, Article XIX of the Oklahoma Constitution, upon entry into the State, or by claim of sovereign right to exclude foreign corporations.

The above proposition, with which we agree, is set forth and argued on pages 20 to 23 of appellant's brief. It is not the position of appellees, or of the Supreme Court of Oklahoma in its decision in the case at bar, that rights guarantied to a foreign insurance company under the Fourteenth Amendment *are or can be waived* by virtue of that part of Section 1, Article 19 of the Constitution of Oklahoma which states that such companies in entering the State

> "shall agree to pay all such taxes and fees as may at any time be imposed by law,"

as such statement necessarily refers to *valid* taxes and fees.

It is appellees position, however (see fourth proposition of this brief), and that of the Supreme Court of Oklahoma in its said decision, that the annual gross premium tax involved here, *while admittedly discriminatory*, does not violate the Fourteenth Amendment of the Constitution of the United States for the reason that under the Constitution and laws of Oklahoma a foreign insurance company is only licensed to do business in Oklahoma for one license year at a time, and that the fee or tax charged such a company for the right or privilege of entering Oklahoma and doing business therein during such a license year may be in any amount that the legislature sees fit to impose.

It is appellees further position that it is immaterial as to whether said fee or tax is collected before or after the exercise of said privilege.

FOURTH PROPOSITION

The annual tax of two per cent (since April 25, 1941 — four per cent) collected on the Oklahoma premiums of foreign insurance companies is not and never has been invalid under the provisions of the Fourteenth Amendment of the Constitution of the United States by reason of the fact that a like tax is not collected on the Oklahoma premiums of competing domestic insurance companies.

On pages 23 to 47 of appellant's brief, under propositions "III" and "IV", the converse of the above proposition is presented. However, it is significant to note, as will be found by an examination of the booklet "Taxation Manual (1942-1943)," published by The

National Board of Underwriters, and of the booklet "Fees and Taxes Charged Insurance Companies," published in 1944 by the Insurance Department of the State of New York (copies of which will be furnished the court by appellees upon request), that while the gross premium tax laws of not less than 29 of the 48 states discriminate heavily against foreign insurance companies, none of said laws have ever been held to violate the Fourteenth Amendment of the Constitution of the United States.

Pertinent Constitutional and Statutory Provisions of Oklahoma

The constitutional and statutory provisions of the State of Oklahoma involved in this case are set forth (R. 52 and 53) by the Oklahoma Supreme Court in its decision in the instant case, as follows:

> "Section 1, Article 19, of the Constitution of the State of Oklahoma, provides:
>
> " 'No foreign insurance company shall be granted a license or permitted to do business in this State until it shall have complied with the laws of the State, including the deposit of such collateral or indemnity for the protection of its patrons within this State as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license.'
>
> "Section 2 of Article 19 provides:
>
> " 'Until otherwise provided by law, all foreign insurance companies * * * shall pay to the

Insurance Commissioner for the use of the State an entrance fee as follows:

" 'Each foreign life Insurance Company, per annum, two hundred dollars; * * *

" '*Until otherwise provided by law, domestic companies excepted, each insurance company*, including [fol. 187] surety and bond companies, *doing business in this State, shall pay an annual tax or two per centum on all premiums collected in the State*, after all cancellations are deducted, and a tax of three dollars on each local agent.'

"Section 10478, O. S. 1931 (first adopted in 1909), *prior to 1941 amendment*, provided:

" '*Every foreign insurance company doing business in this State* under the provisions of this article *shall, annually, on or before the last day of February, report* under oath of the president or secretary or other chief officer of such company to the insurance commissioner, *the total amount of gross premiums received in this State within the twelve months next preceding the first of January* or since the last return of such premiums was made by such company; *and shall at the same time pay* to the insurance commissioner an entrance fee as provided by Article XIX of the Constitution of the State of Oklahoma, and *an annual tax of two per cent on all premiums collected in this State*, after all cancellations and dividends to policy holders are deducted, and an annual tax or three dollars on each local agent, and such other fees as may be paid to said insurance commissioner, which taxes shall be in lieu of all other taxes or fees, and the taxes and fees of any subdivision or

municipality of the State. Any company failing to make such returns and payments promptly and correctly shall forfeit and pay to the insurance commissioner, in addition to the amount of said taxes, the sum of five hundred dollars; and the company so failing or neglecting for sixty days shall thereafter be debarred from transacting any business of insurance in this State until said taxes and penalties are fully paid, and the insurance commissioner shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State.'

"Said section, *as amended in 1941* [36 O. S. 1941 § 104], is substantially the same except the rate of premium tax is 4% instead of 2%.

"36 O. S. 1941, Section 56, provides that the Insurance Commissioner shall furnish each insurance company authorized to do business in the State blank forms upon which to make annual reports, and that such companies shall annually, on or before the last day of February, file with the Insurance Commissioner a statement under oath showing their financial condition as of December 31st of the previous year and:

"' * * * * if the Insurance Comissioner finds that the facts warrant, and that all laws applicable to said company are fully complied with, *he shall issue to said company a license or certificate of authority*, subject to all requirements and conditions of the law, to transact business in this State, specifying in said certificate the particular kind or kinds of insurance it is authorized to transact, *and said certificate shall expire on the last day of February next after its issue.* * * *' "

Administrative Interpretation and Practice of the Oklahoma Insurance Commissioner

The uniform administrative interpretation and practice of the Oklahoma Insurance Commissioner of and under the foregoing constitutional and statutory provisions since the effective date of the 1909 General Insurance Act of Oklahoma (now 36 years)), is set forth and approved in the decision of the Supreme Court of Oklahoma in the case at bar (R. 54 to 57) and in the decision of the Circuit Court of Appeals of the 10th Circuit in the Great Northern case, *supra*.

However, in order that the court may clearly understand said interpretation and practice, both as to the issuance of an original license and of licenses for succeeding years, the following explanation is set forth:

ISSUANCE OF ORIGINAL LICENSE. When a foreign insurance company desires, for the first time, to enter the State of Oklahoma and to do business therein, *it is required*:

(a) *to file* an application for a license to do business in the State to and including the next succeeding last day of February,

(b) *to file* the data required by Section 10474, O. S. 1931 (36 O. S. 1941 § 101),

(c) *to deposit* the collateral required by law,

(d) *to pay* an "entrance fee" of from $25.00 to $200.00,

(e) *to pay*, on or before the next succeeding last day of February (see "Exception" in the Appendix hereof), a tax of two per cent (now four per cent) on all pre-

miums, less proper deductions, which it received in the State after it enters the same and prior to the next succeeding first day of January *for the privilege of so entering Oklahoma and doing business therein from the date it so enters to and including the next succeeding last day of February*; and

(f) *to agree to pay* "all such [valid] taxes and fees as may at any time be imposed by law or act of the legislature."

When the requirements set forth in paragraphs (a), (b), (c), (d), (e) and (f), *supra*, have been met, the company is issued a license entitling it to enter Oklahoma and do business therein from the date of said license to and including the next succeeding last day of February. Said license remains in effect until said date, that is, unless a refusal of said company to pay valid taxes or fees imposed upon it "by law or act of the legislature," such as a refusal to pay valid ad valorem taxes on its real or personal property, "shall work a forfeiture of such license" as provided in Section 1, Article 19, *supra*.

ISSUANCE OF LICENSES FOR SUCCEEDING YEARS.

When a foreign insurance company, which has been permitted to enter the State and to do business therein during any license year, desires to enter the State and to do business therein during the succeeding license year, *it is required*, on or before the last day of February of the then current license year:

(a) *to file* an application for a license to do business in the State from the following

March 1st to and including the next succeeding last day of February.

(b) *to file* the data required by Section 10474, O. S. 1931 (36 O. S. 1941 § 101), the report required by Section 10474, *supra*, as amended (36 O. S. 1941 § 104), and the statement required by said Section 10477 (36 O. S. 1941 § 56),

(c) *to deposit* the collateral required by law,

(d) *to pay* an "entrance fee" of from $25.00 to $200.00,

(e) *to show payment* of a tax of two per cent (now four per cent) on all premiums, less proper deductions, which it received in the State during the preceding calendar year, *which payment was made for the privilege of having been permitted to enter Oklahoma and to do business therein during the then current license year*. Said company is *also required to pay*, on or before the last day of February of said succeeding license year, a similar tax on all premiums, less proper deductions, which it receives in the State during the preceding calendar year, *for the privilege of having been permitted to enter Oklahoma and to do business therein during said succeeding license year*, and

(f) *to agree to pay* "all such [valid] taxes and fees as may at any time be imposed by law or act of the Legislature.

When the requirements set forth in paragraph (a), (b), (c), (d), (e), and (f), *supra*, have been met, the company is issued a license entitling it to

enter Oklahoma and do business therein from March 1st of the then current year, to and including the ~~next succeeding~~ last day of February of the ensuing year. Said license remains in effect until said date, that is, unless a refusal by said company to pay valid taxes or fees imposed upon it "by law or act of the Legislature", such as a refusal to pay valid ad valorem taxes on its real or personal property, "shall work a forfeiture on such license" as provided in Section 1, Article 19, *supra*.

The Philadelphia Fire Association Case

In determining the meaning and validty of the foregoing constitutional and statutory provisions of Oklahoma, especially those that impose an annual *two per cent tax* on the Oklahoma premiums of foreign insurance companies but not on the like premiums of competing domestic insurance companies, the intention of the Constitutional Convention and Legislature of Oklahoma in respectively adopting and enacting the same should be ascertained.

In this connection it must be presumed that said Convention and Legislature in adopting and enacting said provisions in 1907 and 1909, respectively, were cognizant of the fact that the Supreme Court of the United States had theretofore held in the case of *Philadelphia Fire Association* v. *New York* (1886), 119 U. S. 110, 30 L. ed 342 (referred to on pages 35 to 39 of appellant's brief), *that a state law imposing an annual tax on the premiums collected in said state by a foreign insurance company, but not on the like premiums of a competing domestic insurance company, did not violate*

the Fourteenth Amendment of the Constitution of the United States if the tax was imposed for the right or privilege of entering the State and doing business therein during the ensuing license year.

Inasmuch as said case was (and still is) the only decision of the Supreme Court of the United States on said question, it naturally follows that the principles of law announced therein were considered in the adoption and enactment of the constitutional and statutory provisions involved here.

In fact, it is inconceivable that the Oklahoma Constitutional Convention and 1909 Legislature intended to impose said annual two per cent premium tax in such a way as to make same unconstitutional, when a way had been pointed out in said decision to make said tax constitutional.

In this connection appellees quote from the Philadelphia Fire Association case, as follows:

> "As early as 1853, the State of New York, by a statute, c. 466, required of every fire insurance company incorporated by any other state or any foreign government, as a prerequisite to doing business in the state, that it should file an appointment of an attorney on whom process was to be served, and a statement of its pecuniary condition, and procure from a designated public officer a certificate of authority stating that the company had complied with all the requisitions of the statute; and also required *the renewal from year to year* of the statement and evidence of investments; and provided that such public officer, on being satisfied that the capital of the company and its securities and investments remained secure, *should furnish a renewal of the certificate of*

authority. A violation of the provisions was made a penal offense. This act, with immaterial amendments, is still in force.

"This Pennsylvania corporation came into the State of New York [in 1872] to do business by the consent of the state, under this Act of 1853, *with a license granted for a year and has received such license annually to run for a year. It is within the state for any given year under such license, and subject to the conditions prescribed by statute.* The state, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. *If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the state or within its jurisdiction. It is outside, at the threshhold, seeking admission, with consent not yet given.*

"The Act of 1865 [the New York retaliatory law] had been passed when the corporation first established an agency in the state. The amendment of 1875 changed the Act of 1865 only by giving to the superintendent the power of remitting the fees and charges required to be collected by then existing laws. Therefore, the corporation was at all times, after 1872, subject, as a prerequisite to its power to do business in New York, *to the same license fee its own state might thereafter impose on New York companies doing business in Pennsylvania* [the Pennsylvania three per cent premium tax law was passed in 1873]. By going into the State of New York in 1872, it assented to such prerequisite as a condition of its

> admission within the jurisdiction of New York. It could not be of right within such jurisdiction, until it should receive the consent of the state to its entrance therein under the new provisions, and such consent could not be given until the tax, *as a license fee for the future*, should be paid." (Brackets supplied by appellees).

The above case was cited with approval in the case of *Home Indemnity Company of New York* v. *O'Brien* (C. C. A. Mich., 1939), 104 Fed. (2d) 413, apparently as authority for the proposition that a state has the power, by the passage of retaliatory legislation,

> "to protect its own domestic insurance companies doing business in other states from burdens, prohibitions and limitations placed upon them by taxes, license fees, deposits and similar measures."

In this connection it will be noted that if state laws providing for the payment by foreign insurance companies of annual discriminatory privilege taxes are illegal, as contended by appellant, it would be wholly unnecessary for other states to enact retaliatory legislation in effect providing that insurance companies domiciled in states having such discriminatory laws and desiring to do business in said "other states", must, in order to do business therein, pay similar privilege taxes in said "other states."

Oklahoma (36 O. S. 1941 § 106) has a retaliatory law containing, among others, *such retaliatory taxation provisions*, said law being treated as valid in the case of *Read Insurance Com'r.* v. *National Equity Life Insurance Co.*, 114 Fed. (2d) 977, in respect to its retaliatory *policy writing provisions.* Moreover, 40 of the 48

states have similar retaliatory laws. This is shown by the booklet "Taxation Manual (1942-1943)", heretofore mentioned.

Therefore, while Oklahoma insurance companies are favored in Oklahoma by reason of the fact that they are not required to pay said four per cent annual gross premium taxes on their Oklahoma premiums, they are required to pay similar taxes on any premiums that they may collect in 40 of the other 47 states.

Appellees will hereinafter fully show under the subhead "Annual Privilege Taxes May be Paid either Before or After Exercise of Privilege" that the mere fact the New York law required the "license fee for the future" license year *to be paid in advance*, rather than shortly after the beginning of said year, or, as here, at the end of said year, is immaterial, since the real issue involved in said case was based on the fact that the admittedly discriminatory license fee or tax there upheld *was required to be paid for the right or privilege of entering the State of New York and doing business therein for the ensuing license year*, and not on the fact that said fee or tax was required to be paid in advance.

The New York Life Insurance Company Case

The Oklahoma constitutional provisions, as well as Section 10478, O. S. 1931 (Section 6687, C.O.S. 1921), *supra*, were first construed by the Oklahoma Supreme Court, *in so far as the character of the premium tax levied thereby is concerned*, in the case of *New York Life Insurance Company* v. *Board of Commissioners of Oklahoma County* (1932), 155 Okla. 247, 9 Pac. (2d) 936. In said case, which is referred to briefly on page

46 of appellant's brief, the court held that the *two per cent tax* on the Oklahoma premiums of the New York Life Insurance Company was a proper "license fee, or privilege tax" charged said company *"for the right or privilege to do business"* in Oklahoma.

In this connection appellees, for the information of the court, quotes certain pertinent parts of said decision, as follows:

> "Percentage on the income or receipts, by agents of foreign insurance companies, imposed for the privilege of carrying on their business, is not a tax within a constitutional sense. Desty, American Taxation, p. 229 * * *.
>
> *"The state reserves the right to prohibit foreign insurance companies from doing business within the state,* and it may regulate, prescribe, and impose any burdens, terms, or conditions it chooses, reasonable or unreasonable, *in giving its assent to such corporation to engage in business within the state.*
>
> "In the case at bar *no lump sum is designated* as a license fee or privilege tax for the purpose of transacting business within the state. It seems manifest that *a certain percent of the premiums collected by a foreign insurance company is an equitable mode of determining what burden, license fee, or privilege tax should be charged to said corporation for the right or privilege to do business within the state."*

It will be noted from the last paragraph above quoted that the Oklahoma Supreme Court expressly held that "no lump sum" is designated by the constitution and laws of Oklahoma "as a license fee or privilege tax *for the purpose of transacting business within the*

State." Said paragraph clearly shows that the court considered the annual two per cent premium tax set forth in the third paragraph of Section 2, Article 19 of the Oklahoma Constitution, and not the definitely fixed schedule of fees set forth in the second paragraph of said section, *as being charged for the right or privilege of entering Oklahoma and doing business therein.*

Moreover, when said court held in the above case that the payment by a foreign insurance company of said annual two per cent premium tax was not in lieu of ad valorem taxes on its personal property, and that such a company (like a competing domestic company) must pay ad valorem taxes on its personal property in this state, it was undoubtedly aware that said premium tax (there being no like or equalizing tax paid by competing domestic insurance companies), discriminated heavily against foreign insurance companies. Therefore, unless said court was of the opinion that said annual two per cent premium tax was a tax or fee for the right or privilege of entering Oklahoma and doing business therein during the year for which same was paid, it would not have considered or treated said tax as constitutional and valid. It was, therefore, necessary, and not merely *dicta*, for the court to hold that said annual two per cent premium tax was charged:

> "for the right or privilege to do business within the state."

The Lincoln National Life Insurance Company Case

In the decision of the Oklahoma Supreme Court in the above case (R. 48 to 68), hereinafter referred to as the Lincoln National case, *from which decision this appeal is taken,* the court, after quoting the Oklahoma constitutional and statutory provisions set forth in the first subhead of this proposition, and after approving the "Administrative Interpretation and practice of the Oklahoma Insurance Commissioner," as heretofore set out, held:

> *"Under the law licenses issued to foreign insurance companies expire on the last day of February next after the date of their issuance.* If the construction and interpretation by the administrative officer and the court of the constitutional and statutory provisions quoted above is permissible, there is no invalidity in the gross premium tax therein provided.
>
> "It is well settled that a state may withhold from a foreign corporation the privilege of doing business within its borders entirely. It may grant such privilege or authority on such conditions as it may deem fit. *Williams* v. *Standard Oil Company of Louisiana,* 278 U. S. 235, 73 L. ed. 287; *Hanover Fire Insurance Company* v. *Carr, Treasurer,* 272 U. S. 494, 71 L. ed. 372. *These general rules are subject to a well-settled qualification that a state may not impose conditions which require the surrender of rights guaranteed by the Federal Constitution.* The power of a state to exact a gross premium tax from a foreign insurance company for the privilege of doing business within

the state is likewise well settled. *Philadelphia Fire Association* v. *New York*, 119 U. S. 110, 30 L. ed. 342.

"*It is the contention of plaintiff* that because the gross premium tax involved is not payable and could not be computed or collected until the close of the year 1941, it cannot be held as a valid tax for the privilege of doing business in the state during that year.

"*It is not essential that a privilege tax be paid before the exercise of the privilege.* Payment may precede or follow the exercise of the privilege, depending upon which system the Legislature chooses to adopt. *Carpenter, Insurance Commissioner* v. *Peoples Mutual Insurance Company* (Calif.), 74 Pac. 2d 508; *William A. Slater Mills, Inc.* v. *Gilpatric, State Treasurer*, 117 Atl. 806; *Pacific Mutual Life Insurance Company* v. *Hobbs, Commissioner of Insurance* (Kan.), 103 Pac. 2d 854. * * *." (R. 56 and 57).

The Oklahoma Supreme Court then gave its interpretation as to the meaning of the Oklahoma constitutional and statutory provisions involved here (see excerpt quoted on page 8 of appellant's brief), as follows:

"*It is clear that payment of such tax at the end of the licensing year was intended. The reason is that the amount of such tax is dependent on the amount of premiums collected during the taxing year and could not be determined until the end of such year. The tax imposed is clearly a privilege tax. New York Life Insurance Company* v. *Board of Commissioners of Oklahoma County*, 155 Okla. 247, 9 Pac. 2d 936. *It is payable at the end of the year during which the privilege is granted by the State and exercised by the insurance*

company. This is in accord with the departmental construction of the law for more than thirty years. Such departmental construction does not appear to have been challenged by any foreign insurance company during the thirty-two years from 1909 until the amendment of 1941. This long-continued departmental construction should not be overturned without cogent reasons. *Glove Indemnity Company* v. *Bruce*, 81 Fed. 2d 1943; *City of Tulsa* v. *Southwestern Bell Telephone Company*, 75 Fed. 2d 343; *United States* v. *Jackson*, 280 U. S. 183, 74 L. ed. 361; *Federal Land Bank* v. *Warner*, 292 U. S. 53, 78 L. ed. 1120." (R. 59, 60).

The Oklahoma Supreme Court next proceeded to discuss (R. 60 to 62) the Hanover case, *supra*, but as said court's interpretation of the meaning of the Illinois law involved therein is not binding on this court, appellees will not burden this subhead of our brief with further reference thereto.

After completing its analysis of the Hanover case the Oklahoma Supreme Court held (see excerpt quoted on pages 8 and 9 of appellant's brief), as follows:

> "*In the case at bar, the State exacts payment on or before the last day of February of each year of a valid privilege tax, based upon gross premiums collected for the privilege of doing business in this State during the license year, expiring on the date upon which the tax was required to be paid,* and also requires a showing of timely payment of such tax as a condition precedent to the issuance of a license for the ensuing year. As we have seen, the date when the payment for the privilege of doing business in the State is required is not material. It may be before or at the end of the license year. * * *

"From the foregoing authorities we conclude that 36 O. S. 1941, Section 194, does not violate the 14th Amendment, and does not deprive the plaintiff of equal protection of the law." (R. 62, 63).

The Great Northern Life Insurance Company Case

The New York Life Insurance Company case and the Lincoln National case, heretofore discussed, are the *only decisions of the Supreme Court of Oklahoma* interpreting the meaning of the Oklahoma constitutional and statutory provisions involved in this appeal. However, said provisions were also interpreted by the Circuit Court of Appeals of the Tenth Circuit in the Great Northern case, *supra*. (Circuit Judges Phillips, Bratton and Huxman), wherein the validity of the very tax involved here was upheld in a unanimous decision affirming the decision of the Honorable Bower Broaddus, United States District Judge for the Western District of Oklahoma. While said case was dismissed by this court on purely jurisdictional grounds in an appeal therefrom reported in 322 U. S. 47, 88 L. ed. 781 (referred to in the first proposition of this brief), the interpretation of said constitutional and statutory provisions by said Circuit Court was neither approved nor criticised.

We, therefore, respectfully invite attention to the said decision of the Circuit Court *and to the fact* that in each of the three decisions interpreting the meaning of the constitutional and statutory provisions involved here (a) the interpretation is the same and (b) the conclusion has been reached that the Oklahoma premium tax is valid.

The Hanover Fire Insurance Company Case

In the case of Hanover case, *supra*, (referred to repeatedly throughout appellant's brief), the first and third paragraphs of the syllabus are as follows:

> "1. A state may not exact as a condition of a corporation doing business within its limits that its rights secured by the Constitution of the United States may be infringed.
>
> "3. An inequality between a domestic corporation and a foreign corporation with respect to the securing by it of the right to do business within the state does not come within the inhibition of the Federal Constitution against deprivation of the equal protection of the laws."

Inasmuch as the Hanover case is the decision upon which appellant places its chief reliance here, same will be fully discussed by appellees. However, before doing so we desire to call attention to the salient fact, as will hereinafter be shown, that while said case held that the *net receipt tax* of Illinois, as construed by the Illinois Supreme Court in 1923, was discriminatory and invalid, it in effect also held that the 1919 two per cent annual *gross premium tax* of Illinois (same being essentially the same as the tax involved here) was a tax paid for the right or privilege of entering said state and doing business therein for the ensuing license year, and was hence valid even though discriminatory.

Moreover, it is significant to note that while the 1919 Act was passed long after the Hanover Fire Insurance Company first entered the State of Illinois, the annual two per cent gross premium tax ..vied thereby, even though admittedly discriminatory, was held valid

as to said company under the theory that same was a tax for the right or privilege of annually entering said state and doing business therein during the ensuing license year.

In this connection the Hanover case reveals that in 1869 the State of Illinois passed a law relating to the domestication of foreign insurance companies in Illinois. Section 30 of said Act, which was immaterially amended in 1879, operated to annually levy the regular ad valorem tax on the net receipts of such companies during the prior year. Section 22 of said 1869 law provided for the admission and regulation of such a company, required local agents thereof to secure annual certificates of authority from the Director of Trade of said state showing that the company had complied with the law "which applied to it," and also required the company to pay $30.00 for its charter, $10.00 with its annual statement and $2.00 for each agent's certificate of authority. The payment of the net receipts tax provided for in Section 30 was in no way a condition precedent for said company to enter the State of Illinois and to do business therein. No similar tax was required of domestic corporations, but both foreign and domestic companies were required to pay the regular ad valorem tax upon their real and personal property.

The computation of the regular ad valorem tax in Illinois on personal property was in theory upon fifty per cent of the actual value thereof, but as a matter of practice said fifty per cent was debased to thirty per cent, hence personal property in Illinois was actually only taxed on thirty per cent of its actual value. Said net receipts tax, being considered a tax upon personal prop-

erty, was debased to thirty per cent of said net receipts and said ad valorem tax computed thereon. This procedure was followed from 1869 to 1923 (54 years), when the Supreme Court of Illinois held that said ad valorem tax should be levied upon the full amount, rather than upon the debased amount, of the net receipts of a foreign insurance company.

Prior to said holding in the year 1919, the Legislature of Illinois passed a law requiring foreign insurance companies to pay an annual *state tax* for the privilege of doing an insurance business in Illinois equal to *two per cent of the gross amount of the premiums* received thereby during the preceding year, but said law did not repeal or supersede said prior net receipts tax law.

This annual two per cent premium tax, which was levied for a purpose similar to that of the tax involved here, has never been protested by foreign insurance companies doing business in Illinois, and it is specifically stated in the Hanover case that the Hanover Fire Insurance Company had paid said tax.

It was also the contention of the Illinois court in its 1923 decision that while payment of said annual net receipts tax was *not a condition precedent* for said company to enter and do business in said state, that since its agents were required by Section 22 of the 1869 Act, to procure annually from the Insurance Superintendent a certificate of authority stating that the company had "complied with all the requirements" of said Act, and since payment of said net receipts tax was a part of said requirements, said tax was levied as compensation for the privilege of continuing "to do business in said state" and was hence valid even though discriminatory.

The Hanover Fire Insurance Company did not object to the payment of said *net receipts tax* until the Supreme Court of Illinois held in 1923, as aforesaid, that same should be computed upon the actual amount of net receipts and not upon the debased value thereof. After this decision said company refused to pay the full amount of said net receipts tax and filed action to enjoin the collection of a tax warrant therefor.

This court held on appeal that said tax, as so computed, was discriminatory and invalid. In so holding the court, after citing cases to the effect that *a state cannot as a condition precedent to the admission of a foreign corporation to do business therein validly require the corporation to surrender rights guaranteed to it by the Federal Constitution*, such as the right to remove an action brought against it in a state court to a Federal Court, had this to say in relation to the validity of State taxes under the Fourteenth Amendment:

> "In subjecting a law of the state which imposes a charge upon foreign corporations to the test whether such a charge violates the equal protection clause of the Fourteenth Amendment, a line has to be drawn between the burden imposed by the state *for license or privilege to do business in the state* and the tax burden which, having secured the right to do business, the foreign corporation must share with all the corporations and other tax payers of the state. *With respect to the admission fee, so to speak, which the foreign corporation must pay to become a quasi citizen of the state and entitled to equal privileges with citizens of the state, the measure of the burden is in the discretion of the state and any inequality as between the foreign corporation and the domestic corporation in that regard does not come within*

the inhibition of the Fourteenth Amendment; but after its admission, the foreign corporation stands equal and is to be classified with domestic corporations of the same kind. * * *

"What, therefore, we have to decide here is whether the application of section 30 can be one of the conditions upon which the insurance company is admitted to do business in Illinois, or whether under the law of 1919 the authority granted by the department of trade and commerce for which the company paid two per cent of gross premiums received the previous year by it put it upon a level with domestic insurance companies doing business of the same character

"It is plain that compliance with section 30 is *not a condition precedent to permission to do business in Illinois. The State Supreme Court concedes this,* * * *."*

By the above language this court in effect held that while said net receipts tax, as construed by the Illinois court in 1923, was an "occupation tax" or a "privilege tax," same was not paid "for the license or privilege to do business in the state," and that the Illinois court conceded that compliance with said Section 30, to-wit: payment of said net receipts tax,

> "is not a condition precedent to permission to do business in Illinois."

This court also in effect held that said 1919 two per cent annual gross premium tax, *same being similar to the tax involved here,* was a tax for the right or privilege of doing business in Illinois for the ensuing year and hence valid. It will be here noted the court held, that while the license construed in the case of *Southern Railroad Company* v. *Greene,* 216 U. S. 400, 54 L. ed.

536, referred to on pages 38 to 43 of appellant's brief, "was indefinite", the license construed in the Hanover case "must be renewed from year to year." This is shown by the following excerpt from the Hanover case, to-wit:

> "In the Greene case the license was *indefinite*. In this case it must be *renewed from year to year*, but the principle is the same that pending the period of business permitted by the state, the state must not enforce against its licensees unconstitutional burdens."

The above quoted language is in harmony with the holding of this court in the Philadelphia Fire Association case, *supra*, and reveals that the licensing provisions of law, such as the Illinois law construed in the Hanover case, only permit a foreign insurance company to do business in the licensing state for one year. It was probably for this reason that the 1919 two per cent annual gross tax law of Illinois, which, as stated in the Hanover case,

> "* * * provided that each nonresident corporation licensed and admitted to do an insurance business in the state should pay an annual state tax for the privlege of so doing, equal to two per centum of the gross amount of premiums received during the preceding calendar year on contracts covering risks within the state after certain reductions; * * *,"

was treated as valid by this court, and said annual two per cent gross premium tax, both before and since said decision, been paid without question by foreign insurance companies doing business in Illinois.

Appellees above construction of the Hanover case is in harmony with the analysis of said case by the Oklahoma Supreme Court in its instant decision (R. 60 to

62) and by the Circuit Court of Appeals of the Tenth Circuit in the Great Northern case, supra, to which anlyses the court's attention is respectfully invited.

Appellees will hereinafter show under the subhead "Annual Privilege Taxes May Be Paid Either Before or After Exercise of Privileges" that the mere fact the Illinois law required the license fee for the ensuing license year *to be paid in advance* rather than shortly after the beginning of said year, or, *as here*, at the end of said year, is immaterial, since the real issue involved in said case was based on the fact that the admittedly discriminatory license fee or tax there upheld *was required to be paid for the right or privilege of entering the State of Illinois and doing business therein for the ensuing license year*, and not on the fact that said fee or tax was required to be paid in advance.

The Shaffer Oil and Refining Company Case

The Hanover case was followed in the case of *Sneed, Treasurer* v. *Shaffer Oil and Refining Company, et al.*, (C.C.A. 8th Cir., 1929), 35 Fed. (2d) 21 (referred to on pages 42 and 43 of appellant's brief), wherein it is held that an Oklahoma law then enforced by the Oklahoma Corporation Commission, levying an annual discriminatory corporation license tax upon foreign corporations which had theretofore received (like the railway company in the Greene case, supra), an "indefinite license" to do business in Oklahoma from the Oklahoma Secretary of State, was invalid under the Fourteenth Amendment of the Constitution of the United States. Said case is not in point here since a foreign insurance company receives no license whatsoever

from the Oklahoma Secretary of State (see *State* v. *Prudential Ins. Co., et al.*, 180 Okla. 191, 68 Pac. (2d) 852), and the only license or permit it receives is a license from the Oklahoma Insurance Commissioner to do business in Oklahoma for one license year.

Annual Privilege Taxes May Be Paid Either Before or After Exercise of Privilege

By an examination of appellant's brief it will be noted that appellant apparently concedes that under the decision of the Oklahoma Supreme Court in the instant case a foreign insurance company is only licensed to do business in Oklahoma for one year at a time and that the fee or tax charged such a company for the right or privilege of entering Oklahoma and doing business therein for a license year may discriminate heavily against it in favor of a competing domestic insurance company, *but that appellant in effect contends*:

(a) That an admittedly discriminatory fee or tax, such as is involved here, *must be required* by the authorizing state law *to be paid prior* (that is, as a "condition precedent") to the issuance by the state to a foreign corporation of a license granting it the right or privilege of entering the state and doing business therein for the ensuing license year, *in order for said tax to be valid under the Fourteenth Amendment*, and

(b) That the admittedly discriminatory gross premium tax involved here *was not required* by the authorizing Oklahoma law, as construed by the Oklahoma Supreme Court, *to be paid prior* (that is, as a "condition precedent") to the issuance by the state to the Lincoln National Life Insurance Company of a license granting it the right

> or privilege of entering Oklahoma and doing business therein for the license year beginning March 1, 1942, *and that hence said tax is invalid under the Fourteenth Amendment.*

In connection with Appellant's Contention "(a)" supra, to-wit:

> "That an admittedly discriminatory fee or tax, such as is involved here, *must be required* by the authorizing state law *to be paid prior* (that is, a 'condition precedent') to the issuance by the state to a foreign corporation of a license granting it the right or privilege of entering the state and doing business therein for the ensuing license year, *in order for said tax to be valid under the Fourteenth Amendment.*",

it will be noted that if said contention is sound, a state law expressly imposing a discriminatory license fee or tax on a foreign corporation for the right or privilege of entering the state and doing business therein *for a period of either one or twenty years* would be invalid under the Fourteenth Amendment unless said law *requires* all of said fee or tax to be paid prior to the commencement of the exercise of said right or privilege.

For example, if said contention is sound, a state law would be invalid under the Fourteenth Amendment which expressly imposes a discriminatory license fee or tax of $1,000.00 on a foreign corporation for the right or privilege of entering the state and doing business therein *for a period of either one or twenty years,* if said law *provides* that one-half of said fee or tax is payable on or prior to the commencement of said period and the other one-half payable ten days thereafter.

Appellees do not believe, as stated in our analysis of the New York Life Insurance Company case and the

Hanover case, *that the mere fact that the state laws construed therein required the license fees or taxes for the ensuing license year to be paid in advance, rather than shortly after the beginning of said year or, as here, at the end of said year, was material, since the real issue involved in each of said cases was based on the fact that the admittedly discriminatory license fee or tax there upheld was required to be paid for the right or privilege of entering the state and doing business therein for the ensuing fiscal year, and not on the fact that said fee or tax was required to be paid in advance.*

That the above contention of appellant is not sound is revealed by a careful reading of the decision of this court in the Hanover case, from which it appears that *the true criterion* as to whether a fee or tax is paid by a foreign corporation for the right or privilege of entering a state and doing business therein (and hence valid even though discriminatory) is not whether said fee or tax is paid *before of after* the commencement of the exercise of the right or privilege, *but* whether said fee or tax is a

> "burden imposed by the state for license or privilege to do business in the state"

or a

> "tax burden which having secured the right to do business, the foreign corporation must share with all the corporations and other taxpayers of the state.",

as stated by this court in the quotation from said case set forth in the subhead "The Hanover Fire Insurance Company Case" of this brief

Such a tax burden, whether by the laws of the state in question made "due and payable" before or after the beginning of the ensuing license year, is assumed by the

applicant foreign insurance company as a "condition precedent" to the issuance of a license thereto for said year.

In connection with appellant's contention "(b)", supra, to-wit:

> "That the admittedly discriminatory gross premium tax involved here *was not required* by the authorizing Oklahoma law, as construed by the Oklahoma Supreme Court, *to be paid prior* (that is, as a "condition precedent") to the issuance by the state to the Lincoln National Life Insurance Company of a license granting it the right or privilege of entering Oklahoma and doing business therein for the license year beginning March 1, 1942, *and that hence said tax is invalid under the Fourteenth Amendment.*",

it will be noted *that appellant* not only urges in support thereof its contention "(a)", *supra,* but *takes the further position* that the $200.00 annual "entrance fee" paid by a foreign life insurance company under the provisions of the second paragraph of Section 2, Article 19, *supra,* and Section 10478 O. S. 1931, as amended in 1941 (36 O. S. 1941 § 104), is the only fee or tax paid by such a company for the right or privilege of entering Oklahoma and doing business therein for the ensuing license year.

This position is in direct conflict not only with the holding of the Supreme Court of Oklahoma in the instant case but with the prior holding of said court in the New York Life Insurance Company case, heretofore discussed, where, in construing the constitutional and statutory provisions involved here, it was held:

> "In the case at bar *no lump sum is designated as a license fee or privilege tax for the purpose of transacting business within the state.* It seems manifest that a certain percent of the premiums collected by a foreign insurance company is an *equitable mode* of determining what burdens, license fee, or privilege tax should be charged to said corporation for the right or privilege to do business within the state."

Moreover, said annual $200.00 "lump sum" payment is not only inadequate for the privilege of doing business in Oklahoma for a year by a foreign life insurance company, but it is not commensurate to the privilege granted, since one company may do far more business in Oklahoma during a license year than another. It was probably by reason of this patent fact that the annual percentage tax on premiums was required, as stated by the Oklahoma Supreme Court in the New York Life Insurance Company case.

> "for the right or privilege of doing business within the state."

Furthermore, by an examination of 28 O. S. 1941 § 111, it will be found that foreign corporations (other than insurance corporations) desiring to enter Oklahoma and do business therein for periods ranging from twenty years to perpetual existence *are required to pay* to the Oklahoma Secretary of State an admission fee or tax commensurate to the privilege conferred, to-wit: a fee of one-tenth of one per cent of the estimated amount of capital they intend or expect to invest in Oklahoma during the then current fiscal year, and that if they thereafter invest capital in Oklahoma in excess of said estimate *they are required to pay* a like fee or tax thereon, that is,

up to an amount not exceeding the par value of their authorized capital stock

It is not reasonable to believe that the Oklahoma law makers intended to fix the admission fee of all foreign corporations, *except foreign insurance corporations*, in an amount commensurate to the privilege given and at the same time to fix the admission fee of insurance corporations at a "lump sum" not commensurate to the privilege given.

In further support of the issue involved in this subhead of appellant's brief, to-wit: that "Annual Privilege Tax May Be Paid Either Before or After Exercise of Privilege," attention is called to the fourth paragraph of the syllabus of Great Northern case, same being as follows:

> "It is not an essential of a 'privilege tax' that it be paid before exercise of the privilege, *but payment may precede or follow exercise of the privilege as the legislature chooses.*",

and to the third paragraph of the syllabus of Lincoln National case (R. 48), which provides:

> "It is not an essential of a privilege tax exacted by a state from a foreign corporation for the privilege of doing business within the state that it be paid before the exercise of the privilege. *Payment may precede or follow the exercise of the privilege.*"

CONCLUSION

In conclusion appellees desire to state that they fully agree with the proposition that a state cannot lawfully require a foreign corporation to agree to pay an invalid or discriminatory tax after it becomes and while it remains a citizen of the state. In this connection it is appellees position that the State of Oklahoma is not attempting to require appellant to pay an invalid or discriminatory tax after it becomes and while it remains a citizen of the state, to-wit: after it enters the state for a license year, *since the premium tax involved here is required to be paid by a foreign insurance company for the right or privilege of becoming a citizen of the state for said license year.*

Before closing this brief appellees desire to call attention to the fact that the gross premium tax law of Oklahoma, *unlike the net receipts tax of Illinois,* has had a uniform and continuous administrative interpretation since 1909 (36 years) and that said interpretation has been approved not only by the Supreme Court of Oklahoma in the two decisions thereof (the New York Life Insurance Company case and the Lincoln National case), which are pertinent to the issues involved here, but by the United States District Court for the Western District of Oklahoma and the Circuit Court of Appeal of the Tenth Circuit in the Great Northern Life case, *supra.*

In consideration of the propositions, above presented, appellees respectfully ask the court to affirm the decision of the Oklahoma Supreme Court herein, and to render judgment in favor of appellees and against appellant.

Respectfully submitted,

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April, 1945.

APPENDIX

EXCEPTION

If a foreign insurance company enters Oklahoma after the first day of January of a given year, for example, after January 1, 1942, and before the last day of of February of said year (February 28, 1942), to-wit: enters Oklahoma on January 10, 1942, inasmuch as no premiums would be collected by said company in this State prior to January 1, 1942, *supra*, said company could not pay a premium tax on February 28, 1942. Moreover, said company is not required by the Insurance Commissioner to pay taxes on premiums collected by it after January 10, 1942 and before February 28, 1942, or during the calendar year, until the last day of February, 1943, at which time he will require said company to pay taxes on all premiums collected thereby after it entered Oklahoma on January 10, 1942, and before January 1, 1943.

SUPREME COURT OF THE UNITED STATES.

No. 833.—October Term, 1944.

The Lincoln National Life Insurance Company, Appellant, *vs.* Jess G. Read, Insurance Commissioner of the State of Oklahoma, et al. } On Appeal from the Supreme Court of the State of Oklahoma.

[June 11, 1945.]

Mr. Justice Douglas delivered the opinion of the Court.

The sole question presented by this appeal is whether Oklahoma has denied appellant the equal protection of the laws in violation of the Fourteenth Amendment.

Appellant is an Indiana corporation. It qualified to do business in Oklahoma in 1919 and has continued to do business there every year since then. The Oklahoma Constitution then provided, as it does now, in Article XIX, Sec. 1, that:

> "No foreign insurance company shall be granted a license or permitted to do business in this State until it shall have complied with the laws of the State, including the deposit of such collateral or indemnity for the protection of its patrons within this State as may be prescribed by law, and shall agree to pay all such taxes and fees as may at any time be imposed by law or act of the Legislature, on foreign insurance companies, and a refusal to pay such taxes or fees shall work a forfeiture of such license."

Section 2, Article XIX of the Oklahoma Constitution also required all foreign life insurance companies to pay per annum an "entrance fee" of $200, and provided:

> "Until otherwise provided by law, domestic companies excepted, each insurance company, including surety and bond companies, doing business in this State, shall pay an annual tax of two per centum on all premiums collected in the State, after all cancellations are deducted, and a tax of three dollars on each local agent."

Appellant paid the "entrance fee". It made application for a license. And it satisfied the other requirements prescribed by Oklahoma for admission to do business in the State.[1] In each

[1] See Okla. Stat. 1941, Tit. 36, §§ 47, 101.

year subsequent to 1919 it made application for a renewal license and satisfied the various requirements of the State.

When a foreign insurance company desires, for the first time, to do business in Oklahoma, it must apply for a license to expire on the last day of February next after the issue of the license and on or before such date it must pay the gross premium tax on all premiums, less proper deductions, received by it in Oklahoma from the date of its license to and including December 31st of that year. When a foreign insurance company which holds a license to do business in Oklahoma for a particular year desires to do business there during the ensuing year, it must make application for a license on or before the last day of February of the current license year, pay the gross premium tax on premiums received in Oklahoma during the preceding calendar year, and on or before the last day of February of the ensuing license year pay the gross premium tax on premiums received by it in Oklahoma during the preceding calendar year. That is to say, the licenses issued expire on the last day of February next after their issuance; and to obtain a renewal the company must pay on or before the last day of February in each year the gross premium tax on all premiums received during the preceding calendar year. We are told by the Supreme Court of Oklahoma that that has been the uniform administrative practice of the Insurance Commissioner since 1909.

In 1941 Oklahoma enacted a law, effective April 25, which increased the 2 per cent gross premium tax to 4 per cent.[2] Okla. Stat. 1941, Tit. 36, § 104. Like the 2 per cent tax, this new tax is applicable only to foreign insurance companies, not to domestic insurance companies. Appellant reported the gross premiums collected in Oklahoma during the calendar year 1941, paid the 4 per cent tax under protest, and brought this suit to recover the amount so paid. Appellant challenged the constitutionality of both the 2 per cent and the 4 per cent tax. The Supreme Court of Oklahoma allowed recovery of the taxes paid at the increased rate on premiums collected prior to the effective date of the act,

[2] This tax together with the entrance fee and the annual tax on each agent is "in lieu of all other taxes or fees, and the taxes and fees of any subdivision or municipality of the State." Okla. Stat. 1941, Tit. 36, § 104. On a failure to pay the tax the Insurance Commissioner "shall revoke the certificate of authority granted to the agent or agents of that company to transact business in this State." *Id.*

April 25, 1941. But it disallowed recovery for the balance against the claim that the exaction of the tax from foreign insurance companies while domestic insurance companies were exempt violated the equal protection clause of the Fourteenth Amendment. — Okl. —. The case is here by appeal. § 237 Judicial Code, 28 U. S. C. § 344.

We can put to one side such cases as *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, where a foreign insurance company, having obtained an unequivocal license to do business in Illinois and built up a business there, was subsequently subjected to discriminatory taxation. In the present case each annual license, pursuant to the provisions of the Oklahoma Constitution, was granted on condition (1) that appellant agree to pay all such taxes and fees as the legislature might impose on foreign insurance companies and (2) that a refusal to pay such taxes or fees should work a forfeiture of the license. The payment of the gross premium tax on or before the expiration of the license year was always a condition precedent to the issuance of the license for the following year. Accordingly, appellant, unlike the foreign corporation in *Hanover Ins. Co.* v. *Harding, supra,* never obtained from Oklahoma an unequivocal license to do business there; it agreed to pay not only for the renewal but also for the retention of its annual license such taxes as Oklahoma might impose.

It has been held both before and after the Fourteenth Amendment that a State may impose on a foreign corporation for the privilege of doing business within its borders more onerous conditions than it imposes on domestic companies. *Paul* v. *Virginia*, 8 Wall. 168; *Ducat* v. *Chicago*, 10 Wall. 410; *Philadelphia Fire Assoc.* v. *New York*, 119 U. S. 110. But it is said that a State may not impose an unconstitutional condition—that is it may not exact as a condition an infringement or sacrifice of the rights secured to the corporation by the Constitution of the United States.[3] The argument apparently is that since appellant is entitled to the equal protection of the laws, a condition cannot be imposed which results in its unequal and discriminatory treatment.

But that argument proves too much. If it were adopted, then the long established rule that a State may discriminate against foreign corporations by admitting them under more onerous

[3] See the cases reviewed in Hanover Ins. Co. v. Harding, 272 U. S. 494, 507-508; Henderson, The Position of Foreign Corporations in American Constitutional Law (1918), ch. VIII.

conditions than it exacts from domestic companies would go into the discard. Moreover, it has never been held that a State may not exact from a foreign corporation as a condition to admission to do business the payment of a tax measured by the business done within its borders. See *Continental Assurance Co.* v. *Tennessee,* 311 U. S. 5. That was the nature of the tax imposed in *Philadelphia Fire Assoc.* v. *New York, supra.* That company was licensed to do business in New York under a law which required it to pay such a tax as its home State might impose on New York companies doing business there. After it had qualified to do business in New York its home state exacted from foreign corporations a tax of 3 per cent on premiums received in that State. New York accordingly followed suit. The Court sustained the increased tax, saying that since the license of the foreign company was subject to the conditions prescribed by the New York statute, the amount of the tax could at any time be increased for the future. "The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given." 119 U. S. p. 119. And the equal protection clause does not require the tax or rate of tax exacted from a foreign corporation as a condition of entry to be the same as that imposed on domestic corporations. *Hanover Ins. Co.* v. *Harding, supra,* pp. 510-511.

The fact that Oklahoma collects the tax at the end of the license year is not material. That was done in *Philadelphia Fire Assoc.* v. *New York, supra.* The controlling fact is that the tax though collected later was levied upon the privilege of entering the State and engaging in business there.[4] *Continental Assurance Co.* v. *Tennessee, supra.*

Affirmed.

Mr. Justice ROBERTS dissents.

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[4] It is not contended that appellant is engaged in interstate commerce. Hence we do not have presented any question concerning the effect of United States v. South-Eastern Underwriters Assoc., 322 U. S. 533, on the problem.